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APPEARANCES:

FOR THE DEFENDANTS:

Page 1

1 APPEARANCES, cont'd:

2 ALFRED C. WARRINGTON V, ESQ.  
Attorney at Law  
3 Clyde & Co. US LLP  
1221 Brickell Avenue  
4 Suite 1600  
Miami, Florida 33131  
5 (305)329-1799  
alfred.warrington@clydeco.us

6 STEVEN W. ELLIOT, ESQ.  
Attorney at Law  
7 Howell & Fisher, PLLC  
3310 West End Avenue  
8 Suite 550  
Nashville, Tennessee 37203  
9 (615)921-5224  
sellriott@howell-fisher.com

10 JEREMY R. GOOLSBY, ESQ.  
Attorney at Law  
11 Frost Brown Todd LLP  
250 3rd Ave. S.  
12 Suite 1900  
Nashville, Tennessee 37201  
13 (615)251-5583  
jgoolsby@fbtlaw.com

14 ALISSA K. CHRISTOPHER, ESQ.  
JAMES B. HARPER, ESQ.  
Attorney at Law  
15 Cozen O'Connor  
1717 Main Street  
16 Suite 3100  
Dallas, Texas 75201  
17 (214)462-3036  
akchristopher@cozen.com

18 Also Present: David Drumel, Videographer  
19  
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E X H I B I T S

No.	Description	Page
Exhibit 425	- Heinze Expert Report	22
Exhibit 426	- November 17, 2020 E-Mail	66

1 (On record at approximately 9:08 a.m. CT.)

2  
3 THE VIDEOGRAPHER: Good morning. We are  
4 going on the record at 9:08 a.m. on February 8th,  
5 2023. Please note that this deposition is being  
6 conducted virtually. Quality of recording depends  
7 on the quality of the camera and the internet  
8 connection. What is seen from the witness and  
9 heard on the screen is what will be recorded.  
10 Audio and video recording will continue to take  
11 place unless all parties agree to go off the  
12 record.

13 This is Media Unit 1 in the  
14 video-recorded deposition of Bernie Heinze taken  
15 by counsel for the Plaintiff in the matter of  
16 Tractor Supply Company versus ACE American  
17 Insurance Company, et al., filed in the United  
18 States District Court for the Middle District of  
19 Tennessee, Nashville Division, case number  
20 321-CV-00619.

21 This deposition is being held via Zoom.  
22 My name is David Drumel, I am the videographer  
23 with Veritext. The court reporter is Kelly  
24 Forfar.

25 Counsel, please state your appearances

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for the record which will then be followed by the  
swearing of the witness by the court reporter.

MR. BELL: Good morning, I am Mark Bell on behalf of Tractor Supply, I am also joined by Drew Warth.

MR. WARRINGTON: Al Warrington for ACE American and I am joined by Ms. Panelo.

MS. CHRISTOPHER: Alissa Christopher for  
ESIS, Inc. and James Harper also for ESIS, Inc.

MR. PULLIAM: Andy Pulliam and Graham Matherne for UniFirst Corporation.

THE COURT REPORTER: I am sorry, Andrew  
and who?

MR. PULLIAM: Graham Matherne.

THE COURT REPORTER: Thank you.

BERND G. HEINZE,  
having first been duly sworn, was examined and  
testified on his oath as follows:

THE WITNESS: Good morning, Mark.

EXAMINATION

BY MR. BELL:

Q. Hey, good morning, Mr. Heinze, and how are you doing this morning?

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1           A.           I am well. And you?

2           Q.           Doing well, thank you.

3           A.           Good.

4                   MR. BELL: Before we begin, I just want  
5           to put a couple items on the record, two  
6           stipulations that we have, which is the first, an  
7           objection as to one party is good for all parties;  
8           and second, all objections other than to form are  
9           reserved.

10                   Also, Alissa and Mr. Heinze, I understand  
11           that you want to read and sign. Just want to make  
12           sure --

13                   THE WITNESS: Yes, please.

14                   MR. BELL: -- that is okay with everyone.

15                   MS. CHRISTOPHER: Yes.

16                   MR. PULLIAM: Yes.

17                   MR. WARRINGTON: Mark, I would just also  
18           add that we have that standing objection with  
19           respect to claims handling issues given the  
20           Court's Order in dismissing the bad faith claims.

21                   MR. BELL: Understood.

22                   THE COURT REPORTER: All right. I am  
23           sorry, claims handling in this case, what was the  
24           end of that?

25                   MR. WARRINGTON: Yeah, sorry. We have a

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1 standing objection with respect to whether inquiry  
2 into claims handling as to ACE is appropriate  
3 because the bad faith claims have been dismissed.

4 THE COURT REPORTER: Thank you.

5 MR. BELL: And noted on -- on that  
6 objection, and obviously we note our disagreement  
7 with the objection, but understood.

8 BY MR. BELL:

9 Q. Mr. Heinze, this is not your first rodeo,  
10 I understand?

11 A. That's correct.

12 Q. Okay. Do you have any questions about  
13 the ground rules of a deposition?

14 A. No, sir.

15 Q. Okay. How many depositions -- between  
16 taking and being a deponent, how many depositions do  
17 you think you have done?

18 A. As a deponent probably I think it is now  
19 up to around 110, maybe 115. In terms of taking,  
20 probably over 5, 600.

21 Q. Okay. I am not -- I am not going to tell  
22 you anything new other than just to ask is there  
23 anything that would affect your ability to testify  
24 truthfully and honestly today?

25 A. No, sir.

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1           Q.       Okay. Now you have been qualified as an  
2 expert in other cases; is that right?

3           A.       Yes, sir.

4           Q.       And what -- what topics have you been  
5 qualified on?

6           A.       It ranges with regard to the issues of  
7 claims handling practices, the duty of good faith and  
8 fair dealing, generally accepted customs and practices  
9 of the insurance industry and the standard of care,  
10 matters involving directors and officers, general  
11 liability, products liability, policies; it really runs  
12 the gamut, Mr. Bell, with regard to, if you take a look  
13 at Exhibit B to my Report, a variety of different  
14 matters and cases across the country, but most all of  
15 them relate to insurance and insurance coverage  
16 matters.

17          Q.       Okay. Have you ever been limited by a  
18 court as an expert witness?

19          A.       Yes.

20          Q.       And in what respects have you been  
21 limited?

22          A.       Where I have been instructed by counsel  
23 to render an opinion on either a legal issue,  
24 interpretation of a statute, interpretation of a policy  
25 provision, or where I have rendered an opinion that

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1 counsel's behaviors were not in keeping with the  
2 American Bar Association's Code of Professional  
3 Responsibility.

4 Q. And then have you ever been excluded as  
5 an expert witness?

6 A. No, sir.

7 Q. And then you mentioned the -- I think one  
8 of the items you mentioned was the interpretation of a  
9 policy provision; is that right?

10 A. Yes, sir.

11 Q. Okay. And -- and why -- why have you  
12 been limited on the interpretation of a policy  
13 provision?

14 A. That really is something that remains  
15 within the purview of the court and is not something  
16 that would be permissible for expert witness opinion  
17 unless a court leave was sought and permission granted  
18 by the trial court. It was done at the request of  
19 counsel, I understand the instructions, but since  
20 counsel for the adverse party had also commented on  
21 those things, I was asked to do so as well and the  
22 court excluded both of those opinions.

23 Q. Gotcha.

24 In -- in your report here in this case,  
25 did you interpret any policy provisions?

1           A.           No. But I have reserved my right, as I  
2 note in the Report, Mr. Bell, to do so if Mr. Fey is  
3 permitted to testify on those matters as well.

4           Q.           And I understand you reserved your right  
5 to do so. Did -- did your opinion itself express any  
6 opinions on the interpretation of the policy  
7 provisions?

8           A.           No, only to the extent where I referenced  
9 various contractual provisions of the Risk Management  
10 Services Agreement or the Textile Services Agreement  
11 relating to flat goods or the general liability service  
12 instructions as they inform the generally accepted  
13 customs and practices of the duties and  
14 responsibilities of ESIS in its role as UniFirst's  
15 third-party administrator.

16          Q.           But as far as the formal interpretation,  
17 the policy should have provided coverage, the policy  
18 shouldn't have provided coverage, you didn't express  
19 any opinions on those issues directly?

20          A.           It is beyond the scope of my retention,  
21 Mr. Bell. It wasn't anything that ESIS did in its  
22 activities with regard to acting as a third-party  
23 administrator for UniFirst and, therefore, was really  
24 nothing on which comment or opinion was sought from the  
25 folks at ESIS.

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1           Q.           Got it. Let me ask you this, Mr. Heinze.  
2           What -- and I think you referenced that in potentially  
3           Tennessee or potentially Florida, and -- and what law  
4           applies to this dispute?

5           A.           That's something that the Court will need  
6           to determine, Mr. Bell.

7                       MR. PULLIAM: Object to the form.

8                       THE COURT REPORTER: I am sorry, I didn't  
9           catch who said that.

10                      MR. PULLIAM: Andy Pulliam, I was  
11           objecting to the form but I didn't beat Mr.  
12           Heinze's response.

13                      MR. BELL: Sorry, Andy, did you say you  
14           didn't hear Mr. Heinze's response?

15                      MR. PULLIAM: I said I didn't beat his  
16           response to put my objection in before he said it.

17                      MR. BELL: Oh, gotcha, okay.

18           BY MR. BELL:

19                      Q.           Understood on that as far as the  
20           applicable law.

21                      Did you -- in coming to your conclusions,  
22           did you apply any applicable law?

23                      A.           In my Report, Mr. Bell, I laid out what I  
24           understand as a claims professional and in my role as  
25           an expert witness here what the common law and statutes

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1 are of the states of Tennessee and Florida as they  
2 pertain to the allegations contained within Tractor  
3 Supply's Third Amended Complaint against ESIS. But  
4 that was only done for the standpoint of informing  
5 generally accepted insurance customs and practices and  
6 the role in which ESIS played in regard to undertaking  
7 its administrative activities on behalf of UniFirst  
8 pursuant to the Risk Management Services Agreement and  
9 only to the effect that I would reserve the right to  
10 comment upon the issues that are -- the allegations  
11 that are made against ESIS as those common law cases  
12 and/or statutory issues might pertain.

13 Q. Okay. And so you -- you mentioned  
14 Tennessee and Florida; is that right?

15 A. Yes, sir.

16 Q. You didn't mention Massachusetts, did  
17 you?

18 A. No, sir.

19 Q. Did you look at anything related to  
20 Massachusetts?

21 A. No, sir.

22 Q. Did you look at anything related to the  
23 common law of Massachusetts?

24 A. Not with regard to this case, no. I have  
25 testified in Massachusetts before on matters that are

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1 similar to those that are at issue here.

2 Q. Do you know offhand what the -- what the  
3 applicable standards would be in Massachusetts?

4 A. With regard to what?

5 Q. With regard to any of the matters that  
6 you opined on?

7 A. Well, that is a very large area, a rather  
8 large swath of things that I have opined upon. If it  
9 relates to the duties and responsibilities of a  
10 third-party administrator as ESIS was undertaking in  
11 its contractual role here with UniFirst, I believe that  
12 based upon my experience and also acting as a  
13 third-party administrator now of matters that are  
14 coming out of the Commonwealth of Massachusetts, that  
15 they will be the same as I have opined in my Report.

16 Q. Okay. But you didn't specifically  
17 reference anything related to Massachusetts in your  
18 Report, correct?

19 A. Correct. I have reserved my right to  
20 supplement my Report as additional matters come to my  
21 attention or as I am asked to do so by counsel.

22 Q. And did you say that you act as a TPA in  
23 Massachusetts?

24 A. I act as a TPA here in Pennsylvania but  
25 our territory runs from the state of Maine down to

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1 Virginia and west to Ohio.

2 Q. Tell me about that TPA role that you  
3 currently have.

4 A. Sure. We serve as a third-party  
5 administrator for an insurance carrier or also for  
6 various syndicates at Lloyd's on a one-off basis or on  
7 a line of business portfolio perspective.

8 Q. Okay. And you said it is a Lloyd's  
9 syndicate?

10 A. A variety of Lloyd's syndicates will  
11 contact us from time to time to undertake third-party  
12 administrative activities and serve as a claims  
13 administrator on their behalf since they do not have  
14 claims operations in the United States. But the other  
15 matter that we have had since 2002 relates to a  
16 domestic insurer in Georgia, and that's the territory  
17 that I was describing earlier, Mark, that we handle  
18 from Maine down to Virginia, west to Ohio.

19 Q. Gotcha, okay.

20 So you have got the various Lloyd's  
21 syndicates, the 2000 -- or the domestic insurer  
22 in Georgia; any other parties for whom you perform TPA  
23 services?

24 A. No, that's it.

25 Q. Okay. And for the Lloyd's syndicate, is

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1       it the same region that you are involved with as -- as  
2       it is for the domestic insurer in Georgia?

3           A.       No, that's nationwide.

4           Q.       Gotcha.

5                   And the TPA claims for the Lloyd's  
6       syndicate, are they -- what type of lines, is it  
7       specialty lines?

8           A.       It is mostly specialty lines but on the  
9       property side.

10          Q.       Okay, got it.

11                   And what about on -- for the domestic  
12       insurer?

13          A.       Also property, first party property.

14          Q.       First party property, okay.

15          A.       There are a few liability ones in there  
16       as well but in the main it is all first party property.

17          Q.       Gotcha.

18                   And -- and your role as TPA, are you all  
19       doing scene investigations, preparing estimates or what  
20       is your -- what is the scope of your role as a TPA for  
21       those two carriers?

22          A.       We serve as the TPA for the carriers and  
23       then we retain independent adjustors or general  
24       adjustors on the ground to undertake the scene  
25       investigations and provide that information to us that

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1 we then review and evaluate, establish reserves and  
2 provide our reports to the carrier under whose contract  
3 we are operating.

4 Q. Gotcha, okay.

5 And who is the domestic insurer in  
6 Georgia?

7 A. AXIS Insurance Company.

8 Q. A X I S?

9 A. Yes.

10 Q. And AXIS, are they -- they are a division  
11 of someone; who -- is it -- I thought at least. Are  
12 they part -- part of AXA or is it separate?

13 A. No, AXA is a different insurance company  
14 that is domiciled in Paris, France and has operations  
15 throughout Europe and some here within the United  
16 States domestically, but primarily they are run out of  
17 Paris and the AXA Versicherung Aktiengesellschaft in  
18 Cologne, Germany.

19 THE COURT REPORTER: I am sorry, you are  
20 going to have to slow way -- go back and say that  
21 company.

22 THE WITNESS: I will give -- I will give  
23 you the spelling at a break, Kelly.

24 THE COURT REPORTER: Can you just say it  
25 slower so I can write it phonetically at least?

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1 THE WITNESS: Sure. AXA Versicherung,  
2 V E R S I C H E R U N G, Aktiengesellschaft,  
3 A K T I E N G E L L S C H A F T [sic].

4 THE COURT REPORTER: Thank you.

5 THE WITNESS: You're welcome.

6 BY MR. BELL:

7 Q. And the TPA work that you are doing on  
8 behalf of those insurers, is that within the Heinze  
9 Group, LLC?

10 A. Yes, yes.

11 Q. Okay. And how many people work for the  
12 Heinze Group, LLC?

13 A. Nine.

14 Q. And you are president and CEO?

15 A. Yes. And we will use -- when we do our  
16 audits we will use 1099 people on the side, Mark. We  
17 will get people that are specialists or experts in  
18 particular lines of business when we do our audits of  
19 the various insurance companies or TPAs or MGAs.

20 Q. And then of these nine employees, how  
21 many of them do expert witness-related work?

22 A. Just me.

23 Q. Just you, okay.

24 And then the other eight, is it all TPA  
25 work, or what do the other eight do?

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1           A.           The other eight also assist with the TPA  
2           activities, and then we also have an association  
3           management function that we run and their primarily  
4           responsibilities go with regard to that function of the  
5           operation.

6           Q.           Gotcha.

7                       And when you say "association  
8           management," what do you -- what do you mean by that?

9           A.           We represent a number of nonprofit  
10          professional trade associations.

11          Q.           I got it. Like IIABA or something like  
12          that, the Big "I"?

13          A.           Correct.

14                       THE COURT REPORTER: The I -- say that  
15          one more time, Mark.

16                       MR. BELL: The Big "I."

17                       THE COURT REPORTER: But you said AI --

18                       MR. BELL: IIABA.

19                       THE COURT REPORTER: Thank you.

20          BY MR. BELL:

21          Q.           And -- and what is -- tell me about that  
22          association management role, what does -- what does  
23          that entail?

24          A.           Essentially we are the back office of the  
25          professional trade association. We will do everything

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1 from managing the website to undertaking meetings,  
2 trade shows, membership development, newsletters,  
3 promotional activities, making sure that all of the  
4 continuing legal education or continuing education  
5 activities are properly certified by all 50 state bar  
6 associations or 50 state insurance companies; we are  
7 accredited by all 50 state insurance departments.

8 I am an accredited and approved provider  
9 and instructor by all 50 state insurance companies, so  
10 we will do everything from cradle to grave for the  
11 various trade associations as though they were doing it  
12 themselves but have outsourced that function to us,  
13 much like carriers or private companies like UniFirst  
14 have done with TPAs.

15 Q. Gotcha, okay.

16 And are those all insurance trade  
17 associations?

18 A. No.

19 Q. Okay. And how many -- how many  
20 associations is it roughly?

21 A. Currently or in the past?

22 Q. Currently?

23 A. Currently three.

24 Q. And who are those associations?

25 A. The Federation of Defense and Corporate

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1 Counsel, the International Furnishings and Design  
2 Association and the California Insurance Wholesalers  
3 Association.

4 Q. Do you -- do you represent policyholders?

5 A. Yes.

6 Q. And did -- tell me about that role  
7 representing policyholders.

8 A. I don't represent them as counsel,  
9 however as part of my expert witness services, I am  
10 called upon from time to time to review matters  
11 involving people that are policyholders against  
12 insurance companies which -- which I will accept so  
13 long as there is no conflict.

14 Q. Got it.

15 And when you were in private practice,  
16 did you represent policyholders?

17 A. Very limited basis, Mark. I would say  
18 that at most it was 5 percent.

19 Q. Gotcha, okay.

20 Because looking through -- if I am  
21 looking through your recent history of retentions,  
22 there is a Varney Agency; was that on -- was that a  
23 failure-to-procure type case or something?

24 A. That is exactly right.

25 Q. Okay. And were you retained by the -- I

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1 guess that would have been the -- the agency itself in  
2 a claim for failure to procure?

3 A. By the retail agency, that is exactly  
4 right.

5 Q. Okay. And then the others are -- look  
6 like they are all insurers --

7 A. No, there are some policyholders in there  
8 as well, Mark. Would you like me to go through them?

9 Q. No, no. But I was just going to get back  
10 it -- it looks like 20 -- I was just starting from --  
11 from the start -- from the most recent and going back.  
12 And then there is a John Robert Sebo?

13 A. Yes.

14 Q. Is that -- is that a -- that is a policy  
15 holder?

16 A. That's correct.

17 Q. I know that case. We will talk about  
18 that on the break; unrelated.

19 A. Okay.

20 Q. But -- okay. So that is a policyholder.  
21 And, then, just looking back at the last five -- if you  
22 look back at the last five years, who are the other  
23 policyholders?

24 A. Would you mind if I look at my Report?

25 Q. Yeah, yeah, please do. In fact, we will

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1 go ahead and mark that and introduce it as an exhibit;  
2 it is going to be Exhibit 425.

3 Do you have a -- Mr. Heinze, do you have  
4 a hard copy of it also, or are you just using the one  
5 on the screen?

6 A. I do. And actually 425, Mark, is the  
7 Deposition Notice.

8 Q. I am sorry, it should be -- it is  
9 actually the -- it is the Disclosure -- sorry. It is  
10 the ESIS Disclosure and then it includes the Report  
11 beginning on page 6.

12 A. You are absolutely right.

13 Q. No worries, it looked liked a Deposition  
14 Notice at first. But, sorry, there are some other --  
15 some unfamiliar documents, I imagine, at the front of  
16 that that are not yours.

17 A. That is absolutely fine; not to worry.

18 THE COURT REPORTER: So 425 is going to  
19 be -- what is the -- how do I find it?

20 MR. BELL: I just called it the Heinze  
21 Expert Report.

22 THE COURT REPORTER: Okay.

23 (Exhibit 425 - Heinze Expert Report.)

24 THE WITNESS: With regard to past  
25 testimony, I am just looking back here over the

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1           last five years, it looks like the Sebo case was  
2           the only one in which deposition or trial  
3           testimony has been offered. The other ones have  
4           not reached the deposition stage quite yet --

5       BY MR. BELL:

6           Q.       Okay, got it.

7           A.       -- or were amicably resolved short of  
8           that.

9           Q.       Do you have any current engagements for  
10          policyholders?

11          A.       Yes.

12          Q.       Okay. How -- how many currently?

13          A.       Let me take a quick look.

14                   Five.

15          Q.       Five, okay. And in what -- what -- what  
16          type of matters are those, and what type -- what are  
17          those types of engagements; is it TPA-related work or  
18          what -- can you describe just basically at a broad  
19          level what they are.

20          A.       Sure. As I look through them, most all  
21          of them, Mark, relate to claims handling practices; the  
22          generally accepted insurance industry customs and  
23          practices; the duty of good faith and fair dealing; and  
24          there is a property claim with regard to the -- a fire  
25          in a manufacturing facility, there are actually two of

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1       those; and then the others relate just to insurance and  
2       insurance-related matters involving claims handling  
3       activities.

4               Q.       Okay. And then -- so you -- you -- today  
5       you personally handle claims as a TPA?

6               A.       Yes.

7               Q.       And how long have you been handling  
8       claims for?

9               A.       How long have I been handling -- I was  
10      not sure if you were done with your question. How long  
11      have I been handling claims for?

12              Q.       Yes.

13              A.       Since 1983.

14              Q.       Okay.

15              A.       Since I started as an attorney.

16              Q.       And correct me if I am wrong on this,  
17      you -- you have experience handling claims as an  
18      attorney and then also as a -- working for an insurer  
19      and also as a TPA; is that right?

20              A.       Yes, sir.

21              Q.       Okay. Do you have any insurance  
22      designations?

23              A.       No.

24              Q.       Let me ask this. I think you referenced  
25      them in your Report, the Florida Unfair Claims

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1 Settlement Practices Act and the Tennessee Unfair  
2 Claims Settlement Practices Act; is that correct?

3 A. Yes.

4 Q. Did that -- did the -- did the Unfair  
5 Claims Settlements Practices Acts influence your  
6 opinions?

7 A. They were relevant to what I reviewed and  
8 examined as regard to commenting upon the propriety of  
9 the allegations contained within Tractor Supply's Third  
10 Amended Complaint.

11 Q. And did you find anything that was in --  
12 was not in compliance in keeping with either of those  
13 Unfair Claims Settlement Practices Acts?

14 A. As far as ESIS was concerned, no.

15 Q. What about as far as anybody else was  
16 concerned?

17 A. I was not retained to look at anyone  
18 else's activities or services other than those of ESIS.

19 Q. Gotcha.

20 And I understand you may not have been  
21 retained for that but did you -- in reviewing the  
22 materials did you come to any conclusions related to  
23 any other parties?

24 A. No, sir.

25 Q. Okay. Did you -- in reviewing the

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1 materials did you come across anything that seemed odd  
2 or atypical in -- in the handling of the claims,  
3 whether by ESIS or anybody -- any other party?

4 A. I am just taking a pause to think, Mark.  
5 I mean, I have reviewed probably close to 50,000 pages  
6 of this record. And reflecting back on all of it, I  
7 honestly don't have any recollection of anything that I  
8 saw that struck me as being outside of compliance, odd  
9 or unusual with regard to this kind of a high  
10 deductible insurance program and the matter in which  
11 the parties under their respective contracts operated  
12 with one another or the manner in which the claims were  
13 being administered.

14 Q. Okay. You don't remember seeing any  
15 e-mails that you thought, oh, that seems -- that seems  
16 a little out of the norm?

17 A. No.

18 Q. Let me ask you this. You mentioned that  
19 this is typical for how a -- a policy with a high  
20 deductible is handled; is that right?

21 A. Yes.

22 Q. Let me ask you this. Typically when you  
23 have a high deductible plan, the TPA -- is the TPA  
24 retained by the insurer or the insured in -- in a high  
25 deductible plan, not high self-insured retention plan?

1           A.           It depends.

2           Q.           What -- what is typical?

3           A.           It depends upon whether the insurance  
4 carrier has its own claim department or is outsourcing  
5 a particular book of business or a particular insured  
6 to a third-party administrator; it depends upon whether  
7 the insured itself has a risk management or claims  
8 department and is undertaking those activities on its  
9 own or outsourcing those to a third-party  
10 administrator. I couldn't say which one was more  
11 typical than the other; I have seen it both ways. At  
12 Reliance we had self-insured retention policies; we had  
13 high deductible policies, as the one that is at issue  
14 here; and we had TPAs that were responding on behalf of  
15 both the insured; and at times we would have a TPA  
16 called Sterling that we would utilize for the handling  
17 of those, usually the SIR programs, the higher SIR  
18 programs.

19           Q.           Okay. And you said that the -- in  
20 some -- or I think you said this.

21                       And if ever I say you said something, I  
22 am not trying to say something incorrect. So if I ever  
23 say you said something and it is incorrect, please do  
24 correct me.

25                       But I thought that you had said

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1       that the -- that in many instances the -- the insurer  
2       may outsource to a TPA; is that right?

3             A.       Yes.

4             Q.       And is that what happened in this case?

5             A.       No, the insured outsourced to a  
6       third-party administrator here.

7             Q.       Okay. And then who did the investigation  
8       and claims handling on behalf of the insurer?

9             A.       Well, the insurer, if referring to ACE or  
10       referring to Tractor Supply's insurer?

11            Q.       ACE.

12            A.       At ACE. The way the high deductible  
13       program worked is that the investigation would be  
14       conducted by ESIS.

15            Q.       So the investigation is conducted by  
16       ESIS --

17            A.       -- on behalf of UniFirst.

18            Q.       -- on behalf of UniFirst, right.

19            A.       Correct.

20            Q.       And that's not -- that's not problematic  
21       that the -- that the named insured's TPA is doing the  
22       investigation for an additional insured on the policy?

23                    MR. WARRINGTON: Form.

24                    MS. CHRISTOPHER: Object to form.

25                    THE WITNESS: That's a different

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1 question. It is not unusual, excuse me, for a  
2 third-party administrator to undertake an  
3 investigation of the underlying facts and  
4 circumstances to determine liability with regard  
5 to the accident that is allegedly having been  
6 reported to the Tractor Supply folks of someone  
7 having fallen or tripped or becoming injured by  
8 one of UniFirst's mats while they were at the  
9 Tractor Supply location.

10 The issue with regard to investigating  
11 additional insured status was done by ACE.

12 BY MR. BELL:

13 Q. And who did that investigation on ACE's  
14 behalf?

15 A. ACE employees.

16 Q. What is your -- what gives you the  
17 understanding that ACE employees did the investigation  
18 into coverage for the additional insured?

19 A. That was something that was consistent  
20 within the testimony of the depositions and consistent  
21 in the e-mails that I saw with regard to the activities  
22 to determine whether Tractor Supply could be afforded  
23 additional insured status on the claims that were  
24 reported.

25 Q. Would it be improper for ESIS to have

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1 done the investigation into additional insured  
2 coverage?

3 MR. WARRINGTON: Form.

4 THE WITNESS: Well, it didn't --

5 THE COURT REPORTER: Wait, who said form?  
6 Was that you, Al?

7 MR. WARRINGTON: Yes.

8 THE COURT REPORTER: Thank you.

9 THE WITNESS: It -- it didn't undertake  
10 those investigations, it limited its investigation  
11 with regard to the liability of UniFirst based  
12 upon the claims that were reported to Tractor  
13 Supply.

14 The issues involving investigations of  
15 additional insured status was undertaken by Marcia  
16 Flagg and others at ACE Insurance Company.

17 BY MR. BELL:

18 Q. Did you say Marcia Flagg at ACE?

19 A. I am sorry. No, I am sorry, she was at  
20 ESIS. I apologize. By people at -- at ACE.

21 I think I remember Brooke Skolnik's  
22 deposition testimony that all of the activities  
23 relating to additional insureds were undertaken by ACE  
24 employees, and I believe Ms. Flagg testified to that  
25 same thing in her deposition where she says, as I note

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1 in my Report, that she undertook no activities with  
2 regard to examining coverage issues whatsoever.

3 Q. Okay. So you said -- and I understand  
4 what you said here is that in this case it -- it  
5 didn't, that ESIS didn't do the investigation on behalf  
6 of ACE.

7 A. Right.

8 Q. What I am asking you is would it be  
9 inappropriate if ESIS had done the investigation into  
10 coverage on behalf of ACE?

11 A. Well, it didn't have any duties or  
12 responsibilities to ACE, its contract was completely  
13 and solely with UniFirst, so that would -- if they had  
14 done something like that, it would have been outside  
15 the activities for which they were contracted with  
16 UniFirst.

17 Q. And would that have been inappropriate  
18 also?

19 A. I would have to take a look at the  
20 individual activities or what the claim professional  
21 had before them at the time in order to make that  
22 determination.

23 Q. I mean, it doesn't seem terribly  
24 complicated. If it -- you said that the -- I thought  
25 you had said that the ACE -- or somebody acting on

1 ACE's behalf needed to do the investigation into  
2 coverage, right?

3 A. Yes.

4 Q. And so if ESIS did the investigation and  
5 not ACE, then that would be inappropriate, would it  
6 not?

7 A. Again --

8 MR. PULLIAM: Object to the form.

9 THE WITNESS: -- again, Mark, I would  
10 just have to say --

11 THE COURT REPORTER: Who said that, I am  
12 sorry?

13 MR. PULLIAM: Andy Pulliam.

14 THE WITNESS: I would need to take a look  
15 at exactly what was done, why it was done and what  
16 those circumstances were, otherwise it would just  
17 be speculation.

18 BY MR. BELL:

19 Q. Would it -- would it -- would it need to  
20 be some -- you said you need to look at the  
21 circumstances. Would it need to be some atypical or  
22 exceptional circumstances to make that appropriate?

23 A. Again, it would cause -- I don't want to  
24 box myself in, Mark, with regard to commenting on a  
25 hypothetical on which I don't have any facts, so I

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1 would just have to say that I would need to take a look  
2 specifically at what those facts or circumstances were  
3 if, in fact, that were done; but in my review of the  
4 record here, it was not.

5 Q. Now here ESIS really played two different  
6 roles, did it not?

7 A. Well, I think the role that they played  
8 was to act as a third-party administrator for UniFirst  
9 under its Risk Management Services Agreement.

10 Q. Did it play any other role?

11 A. In terms of what?

12 Q. Was ESIS not also the TPA for the  
13 conflict files?

14 A. A conflict file would be established in  
15 the event there was an acceptance by ACE of an  
16 additional insured tender for purposes of defending  
17 that particular claim. There was a conflict file also  
18 set up by ACE as well as by ESIS.

19 Q. And here there were conflict files that  
20 were set up, right?

21 A. Yes.

22 Q. Okay. So in those situations then ESIS  
23 is really playing two different roles, is it not?

24 A. No, it is merely monitoring the  
25 activities that ACE is undertaking with regard to

1       having accepted the additional insured tender and  
2       offering the defense under a reservation of rights.

3               Q.       So what is the role of ESIS with respect  
4       to a conflict file?

5               A.       To make sure that the adjustor that is  
6       undertaking the liability investigation for UniFirst is  
7       not subjected to any of the activities that are taking  
8       place involving the coverage evaluation or the defense  
9       that is provided under reservation of rights to Tractor  
10      Supply by ACE.

11              Q.       Sir, walk -- walk me through that again.  
12      Sorry, I don't think I caught that all.  Sorry, do you  
13      mind explaining that to me, again, Mr. Heinze?

14              A.       Sure.

15                      Kelly, could you read back the question,  
16      please.  I'll tell you what, why don't you read back  
17      the question, if you would, and the answer.

18                      And maybe, Mark, let's both listen to it  
19      again and see if that makes sense.

20                      MR. BELL:  Sure.

21                      (Whereupon the record was read  
22      back as requested.)

23                      THE WITNESS:  Right.  Does that make  
24      sense, Mark?

1 BY MR. BELL:

2 Q. Not -- not really. Let me try to break  
3 it out some.

4 So you said -- I thought you were saying  
5 -- or I thought in reading it back -- or hearing it  
6 back, you said to make sure the adjustor involved in  
7 the liability is not subject to a coverage evaluation  
8 or defense; is that --

9 A. Is not being subjected to seeing any of  
10 the coverage activities or the undertaking of a defense  
11 for Tractor Supply by ACE under a reservation of  
12 rights. You want to make sure that those lines of  
13 demarcation are kept separate and independent so that  
14 there is no crossover and so that, as Mr. Fey rightly  
15 said, that firewall is maintained.

16 Q. I gotcha.

17 So what -- so is it -- so when ESIS is  
18 handling -- when handling a claim -- a conflict file  
19 claim, are they doing that on behalf of ACE, or who are  
20 they doing that on behalf of?

21 A. They are doing it on -- through the  
22 auspices of the Risk Management Services Agreement with  
23 UniFirst.

24 Q. Okay. It is -- so -- so even when it  
25 is -- when -- when ESIS's role with respect to the

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1 additional insured is still within the auspices of  
2 ESIS's contract with the TP -- with UniFirst?

3 A. Yes. Because the deductible for the  
4 first four years of the program was \$500,000 per  
5 occurrence and in the last year was a million dollars  
6 per occurrence, so all of the activities were taking  
7 place within that deductible layer, and that's what  
8 ESIS was under contract with UniFirst, to assist as a  
9 third-party administrator.

10 Q. Okay. So ESIS's role -- let me -- let me  
11 ask it this way.

12 ESIS's role in that TPA side, even in a  
13 conflict file, is just as it relates to liability; is  
14 that right?

15 A. It is as it relates to liability for  
16 UniFirst, that is correct. And it is monitoring the  
17 activities that ACE is undertaking in providing the  
18 defense under a reservation of rights to Tractor  
19 Supply.

20 Q. So, for instance, like settlement  
21 authority in a conflict file, who -- who would give  
22 settlement authority?

23 A. In a conflict file where there was an  
24 additional insured tender that was accepted under a  
25 reservation of rights, that settlement authority would

1       come from ACE.

2               Q.       And what would ESIS's role -- or what  
3       should ESIS's role be with respect to settlement  
4       authority?

5               A.       The settlement authority that ESIS had  
6       was, I believe, if my memory serves me correctly, Mark,  
7       \$10,000 on behalf of UniFirst; and where matters were  
8       up to and including \$10,000, it had the authority to  
9       settle those claims on behalf of UniFirst.

10              Q.       I -- I got that with respect to the  
11       UniFirst but what about as it relates to a conflict  
12       file for the additional insured?

13              A.       It had no settlement authority on behalf  
14       of ACE.

15              Q.       Gotcha. Okay, so --

16              A.       Because its authority -- sorry to  
17       interrupt. Its authority was primarily and solely  
18       through the contract of the Risk Management Services  
19       Agreement. It had no similar agreement or any other  
20       type of contractual relationship in regard to these  
21       issues in this matter with ACE.

22              Q.       So it had -- did I hear you right that --  
23       that ESIS had no settlement authority with respect to  
24       ACE?

25              A.       With regard -- with regard to the matters

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1 involving the UniFirst mats, correct, that's my  
2 understanding.

3 Q. And then who -- so who was charged with  
4 doing the investigation of coverage?

5 A. As I testified, that would be with regard  
6 to the folks at ACE.

7 Q. ACE, okay.

8 Did you see any evidence of any employees  
9 from ACE contacting anyone from Tractor Supply about  
10 any individual accidents?

11 A. I don't recall as I am sitting here at  
12 the moment. In all likelihood it probably would have  
13 gone through Gallagher Bassett which was Tractor  
14 Supply's third-party administrator if it happened, but  
15 I just don't recall as I am sitting here at the moment.

16 Q. Do you remember -- did you see the  
17 testimony of -- the deposition testimony of ESIS's  
18 corporate representative?

19 A. Mr. Christman [sic]?

20 Q. Yes.

21 A. Yes. Or Christensen, I think it was.

22 Q. I think that is right.

23 A. Yeah.

24 Q. I think I said his name wrong 20 times  
25 during the deposition.

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1                   But the -- do you remember a discussion  
2                   in his deposition about a matter being open for defense  
3                   only?

4                   A.           I do recall that, yes.

5                   Q.           And I think he had testified, and correct  
6                   me if I am wrong, that all of the -- all of the matters  
7                   for Tractor Supply's additional insured were opened for  
8                   defense only; is that right?

9                   A.           I would have to go back and look at the  
10                  exact testimony, Mark, I don't recall exactly what  
11                  Mr. Christensen's testimony was verbatim, but I would  
12                  allow that testimony to stand as it is. I did  
13                  certainly see that.

14                  Q.           Okay. And I guess the idea of if it was  
15                  defense only that would be consistent with your  
16                  understanding that ACE didn't actually -- I am sorry,  
17                  ESIS didn't have settlement authority on behalf of ACE,  
18                  right?

19                  A.           Correct.

20                  Q.           Let me ask you this. You -- the MedPay,  
21                  you are familiar with MedPay?

22                  A.           Yes.

23                  Q.           Why was -- why did ESIS not offer MedPay  
24                  to any of the claimants?

25                  A.           I am not interpreting the policy here,

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1 Mark, but my understanding in looking at the 2016  
2 through 2020 policies of ACE that were afforded to  
3 UniFirst, was that on product liability claims there  
4 was no MedPay coverage.

5 Q. What -- what leads you to that  
6 conclusion?

7 A. I believe that was a provision within the  
8 policy.

9 Q. That the policy said there was no MedPay?

10 A. On product liability claims.

11 Q. Any -- anything else that you can recall  
12 as to why there wouldn't have been MedPay?

13 Excuse me.

14 A. Well, the policy speaks for itself so if  
15 there is not going to be MedPay coverage on product  
16 liability matters, that pretty much is what the policy  
17 says. There may be other provisions and the policy was  
18 quite long but I do recall that particular aspect of  
19 the policy.

20 Q. And then -- because I -- did you see  
21 e-mails or correspondence in the files where ESIS told  
22 claimants that there was no MedPay on the ACE policies?

23 A. I believe so. I would have to go back  
24 and take a look.

25 Q. And you agree with me that there was --

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1       there was MedPay available under the policies, although  
2       perhaps in certain circumstances -- let me break up the  
3       question.

4                    You would agree with me that subject to  
5       the limitations of the policy there was MedPay on the  
6       policies, right?

7           A.       Yes.

8           Q.       Okay. And so in a particular instance  
9       MedPay may or may not have applied, right?

10          A.       Again, I am not making any coverage  
11       determinations, Mark, I was not asked to do any  
12       coverage evaluations. I took the coverage as I found  
13       it and rendered my opinions accordingly.

14          Q.       And I am not going to argue with you  
15       about whether there was or was not MedPay just because  
16       I know you are not -- you weren't asked to testify --  
17       you weren't asked to testify about whether the policy  
18       did or didn't provide MedPay, right?

19       A.       Correct.

20       Q.       Okay.

21       A.       Not at this time, at least.

22       Q.       Gotcha.

23                    Let's -- let's look at your Report, if  
24       you can bring that up, Exhibit 425. And I am going to  
25       reference page numbers on your Report.

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1 A. Okay.

2 Q. Those are the -- those are going to be  
3 the page numbers on the -- on the bottom corner of the  
4 Report rather than the -- than the .pdf number.

5 A. Understood.

6 Q. So if we go to page 20 of your Report,  
7 there is footnote 14 --

8 A. Yes.

9 Q. Is this -- this is the -- we had talked  
10 about this earlier. Is this the explanation as to why  
11 you did not give an interpretation on the -- on the  
12 policy interpretation or the -- sort of the common law  
13 duties?

14 A. And the statutes, because that is really  
15 something that's outside the purview of expert witness  
16 testimony. But as I said, Mark, I have reserved my  
17 right to do so if it would be of assistance to the  
18 Court, and if Mr. Fey is permitted to testify on it, I  
19 would be respectfully requesting to do so as well. But  
20 as I took everything in, certainly in what I do as a  
21 claims professional and as I have done throughout my  
22 entire career, customs and practices in the insurance  
23 industry are certainly informed by common law and  
24 statutes, so I certainly took those into consideration  
25 when I examined the allegations in Tractor Supply's

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1 Third Amended Complaint and issued my opinions  
2 accordingly.

3 Q. Got it.

4 And if you would go with me on the Report  
5 to page 32, the -- the first paragraph there; are  
6 you -- are you there?

7 A. I am.

8 Q. Okay. It says: What's more, ESIS  
9 adhered to these processes even when the underlying  
10 facts clearly showed that an incident did not quote,  
11 unquote, result from a UniFirst mat.

12 Do you see that?

13 A. I do.

14 Q. What did -- what do you mean that the --  
15 that the facts clearly showed the incident did not  
16 result from a UniFirst mat?

17 A. Right. So in the 60 claims that were  
18 tendered, Mark, and it would help if I go back to page  
19 31 to put this in context.

20 Q. Sure.

21 A. There is a discussion with regard to what  
22 was done and how the facts were developed in ESIS's  
23 determination of its liability investigation on behalf  
24 of UniFirst. And in the course of that investigation,  
25 if I remember the various facts of some of the claims,

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1       there were situations in which someone may have tripped  
2       over a cane or someone in a walking boot may have  
3       stumbled on a mat where it really wasn't the mat's role  
4       or responsibility of having caused the accident, it was  
5       merely incidental to where the accident occurred.

6           Q.       I gotcha. So you -- when you say that  
7       the underlying facts clearly show the incident did not  
8       result from a UniFirst mat, are you referring to all 60  
9       claims or just a certain subset within the 60 claims?

10          A.       I am referring to those matters that were  
11       tendered by Tractor Supply for coverage and ESIS's  
12       investigation with regard to whether the mats were or  
13       were not at fault from -- for the accident or the  
14       injuries that were sustained by that particular  
15       claimant.

16          Q.       Did you find in reviewing the files in  
17       any of the 60 underlying claim files that the accidents  
18       resulted from the mat?

19          A.       I think that would be involving those  
20       potentially eight matters in which ACE agreed to defend  
21       under a reservation of rights where there may have been  
22       an indication that the mats may have been involved in  
23       precipitating or resulting in the claimant's injuries.

24          Q.       Gotcha.

25               Now you -- you put the words "result

1 from" in quotes, right?

2 A. Yes.

3 Q. What does "result from" mean, in general  
4 insurance parlance?

5 A. That that's what caused the accident.

6 Q. So would it be your position that  
7 "results from" and "caused by" mean the same thing?

8 A. That would -- that would require a legal  
9 interpretation, I think. I -- I am going to stick by  
10 what I said in my Report. I would -- in normal  
11 insurance parlance, what I am referring to here is that  
12 the mats were involved in precipitating the accident as  
13 opposed to merely being incidental to where the  
14 accident occurred.

15 Q. I gotcha.

16 So "results from," that's -- another way  
17 to say results from would be "involved in precipitating  
18 the incident"?

19 A. I would agree with that, yes.

20 Q. Okay. And is that a generally accepted  
21 -- and that definition, is that just sort of a  
22 generally accepted insurance term for "results from"?

23 A. It is the one that I use.

24 Q. Gotcha, okay. Gotcha.

25 All right. And so would you agree with

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1 me that -- or let me ask you this. Yeah. Would you  
2 agree with me "arising from," "results from," and  
3 "caused by," those three terms are all used in  
4 insurance policies, right?

5 A. They are.

6 Q. Would you agree with me that they all  
7 mean something slightly different from one another?

8 A. They can.

9 Q. Can, okay.

10 And so they can but do they, I guess?

11 A. Well, again, that would require a look at  
12 the entire context of the paragraph or the sentence,  
13 Mark. It -- all I can say is they can mean different  
14 things but I would have to see it in the particular  
15 parlance of that, and, again, I am not making any kind  
16 of coverage interpretations at this point.

17 Q. Gotcha.

18 A. All I am saying here is what those eight  
19 litigation matters that were tendered and accepted by  
20 ACE under a reservation of rights was based upon the  
21 fact that the liability investigation conducted by ESIS  
22 on behalf of UniFirst indicated that the mats may have  
23 been responsible or that the damages may have resulted  
24 from the mats. And that's why ACE, I think, decided to  
25 afford a defense under a reservation of rights under

1       those circumstances.

2               Q.       Gotcha, okay.

3                       You -- you mentioned there the  
4       investigation on behalf of -- I am sorry -- the  
5       investigation by ESIS, the liability investigation by  
6       ESIS, right?

7               A.       Yes.

8               Q.       Okay. And let me ask you this. Are  
9       the -- the -- the investigation by ESIS, if we have got  
10      a situation where there is a conflict file, so we have  
11      got two -- got two ESIS adjustors, right?

12              A.       I am following you.

13              Q.       Okay, sorry. So we have got two ESIS  
14      adjustors for a conflict file, who does the  
15      investigation into liability?

16              A.       One of those ESIS adjustors.

17              Q.       It only has to be one of them?

18              A.       Well, the other one would not have been  
19      involved yet because the tender investigation had to be  
20      provided so that ACE could make a determination as to  
21      whether or not to afford coverage under a reservation  
22      of rights; that's, then, when the conflict adjustor was  
23      assigned both at ESIS as well as at ACE.

24              Q.       So does the conflict adjustor do any  
25      investigation into liability?

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1           A.           They can. It is certainly not anything  
2           that I have seen that would be unusual but in all -- in  
3           most situations they do not, they confine themselves to  
4           undertaking only those activities involving the defense  
5           now of the additional insured under the reservation of  
6           rights.

7           Q.           Now let me -- let me -- let me make sure  
8           I am clear on something. You said that they undertake  
9           only the actions in defense of the additional insured;  
10          is that -- is that right?

11          A.           The one conflict adjustor at ESIS and the  
12          conflict adjustor at ACE --

13          Q.           Gotcha.

14          A.           -- whereas the liability investigation  
15          was undertaken on behalf of UniFirst by the other ESIS  
16          adjustor.

17          Q.           Okay. So -- and typically the only  
18          investigation that is done into liability is done by  
19          the ESIS adjustor on behalf of UniFirst?

20          A.           Yes. But I -- again, I am not saying  
21          that exclusively that a conflict adjustor may not from  
22          time to time also look at some other aspects as the  
23          defense of the case is being conducted.

24          Q.           Now the defense of the additional insured  
25          in the conflict file, what -- what -- what role does



1       ESIS have in that?

2           A.       It is acting in a role on behalf of  
3       UniFirst of monitoring the activities and the  
4       litigation that is now taking place and conducting its  
5       activities in concert with the duties and  
6       responsibilities that are outlined in the Risk  
7       Management Services Agreement.

8           Q.       Okay. So -- so even on a conflict file,  
9       ESIS is only monitoring on behalf of UniFirst; is that  
10      right?

11          A.       Yes.

12          Q.       So they are not monitoring on behalf of  
13      ACE, right?

14          A.       Correct.

15          Q.       What interactions between ESIS and ACE  
16      should take place with respect to a conflict file?

17          A.       I am not sure I understand the question.

18          Q.       Yeah, sure. So you have got a -- you  
19      have got a -- so on the main file, the UniFirst file,  
20      you will have -- I am sure you saw there is some  
21      communications about liability and history and  
22      everything else, right?

23          A.       Right.

24          Q.       And so that's -- those are communications  
25      that are taking place between ESIS -- I don't want to

1       -- I put my hands like this because it is a battle, but  
2       they are between ESIS and they are between ACE?

3           A.       Well, it is not a battle.

4           Q.       Right, I said it is not a battle; when I  
5       put my hands like this, I said I don't mean it is a  
6       battle, I meant they are communicating with each other.

7           A.       Well, the communications that are taking  
8       place are between ESIS and UniFirst.

9           Q.       And also ESIS is communicating with ACE,  
10      are they not?

11          A.       The liability adjustor is communicating  
12      with UniFirst, the conflict adjustor may be  
13      communicating with ACE. Again, to keep those aspects  
14      separate with regard to coverage and the reservation of  
15      rights.

16          Q.       I got -- I am with you. I mean on the --  
17      on the non-conflict file, the UniFirst file, the ESIS  
18      employee is communicating with ACE about liability and  
19      other matters, right?

20          A.       They can. They certainly share the  
21      information if it is being requested but in those kind  
22      of situations, from what I have seen, most of those  
23      matters of the 60, most of them were probably amicably  
24      resolved within the authority that ESIS had. There  
25      were about 50 of them that were also put into

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1 litigation that were not pursued. And 19 of those, I  
2 think if my memory serves me correctly, were closed  
3 without payment, and the rest of them were closed or  
4 settled within the authority that ESIS had under its  
5 authority from UniFirst under the high deductible  
6 program.

7 Q. Right, but ESIS and ACE are communicating  
8 about the liability, I mean, that's where ESIS -- ACE  
9 is getting the information about how long the mat was  
10 in its care, custody -- in Tractor Supply's care,  
11 custody and control, is it not?

12 A. They can see that if it is certainly  
13 requested but, again, ACE is being placed on notice of  
14 matters in which there is a tender of an additional  
15 insured endorsement. In most of these situations where  
16 the investigation on liability is conducted, it is  
17 communications between the ESIS adjustor and UniFirst.

18 Q. Sure. But the ones -- I am talking about  
19 the ones where there was a tender to ACE for an  
20 additional insured status.

21 A. Okay, that's different. That -- then in  
22 that situation there may very well be a review by ACE  
23 of the investigation that was conducted by the ESIS  
24 adjustor.

25 Q. Okay. And so in those situations, the

1 same ones where you have got a tender that's been -- an  
2 additional insured tender to ACE and you have got a  
3 conflict file, what -- what interactions do the ESIS  
4 conflict rep have with the ACE adjustor?

5 A. I think it is basically just monitoring  
6 what is taking place in the litigation but it has  
7 nothing to do with any of the coverage issues that ACE  
8 has made with regard to whether or to what extent  
9 coverage will be afforded under a reservation of rights  
10 for the additional insured tender that was made by  
11 Tractor Supply.

12 Q. Okay. So -- so you mentioned monitoring.  
13 What -- what other roles other than monitoring does the  
14 conflict -- ESIS conflict adjustor have with respect to  
15 a conflict file?

16 A. Well, I think it is probably just based  
17 upon what is taking place in the litigation and to make  
18 sure that there is no information pertaining to the  
19 coverage issues or the matters that are involved solely  
20 for ACE's review that are being examined by the  
21 liability adjustor for ESIS on behalf of UniFirst.

22 Q. Anything else that that conflict adjustor  
23 is supposed to be doing?

24 A. There may have been other things. If  
25 there is something that you would like me to take a

1 look at, I would be happy to see it, but that is what  
2 my best recollection is in terms of what the ESIS  
3 conflict adjustor was doing.

4 Q. Got it, okay.

5 And you said that their -- I thought that  
6 you said that their role was also to make sure no  
7 information pertaining -- pertaining to coverage was --  
8 was issued; is that right?

9 A. Yes.

10 Q. And so ESIS -- for the conflict file,  
11 ESIS has no role whatsoever with respect to coverage;  
12 is that right?

13 A. That's correct, all of the coverage  
14 decisions were made by ACE.

15 Q. What about with respect to an  
16 investigation? Did -- did ESIS perform investigations  
17 on ACE's behalf for conflict files?

18 A. No.

19 Q. Would that be improper if ESIS had?

20 A. It would have to have been done under  
21 various circumstances. I have to take a look at what  
22 those circumstances were or what the requests were, but  
23 the bottom line here from what I have reviewed in the  
24 record was that ESIS limited its activities to those  
25 instructions, the special -- the general liability

1 service instructions as well as the duties and  
2 responsibilities it had under the Risk Management  
3 Services Agreement with UniFirst and that alone. All  
4 of the aspects with regard to investigations of  
5 coverage were undertaken by ACE in -- in their role as  
6 the underwriter for this program.

7 Q. If you would, scroll up with me. I think  
8 you were looking at page 31 last.

9 A. And 32, right.

10 Q. Yes. If you could scroll up a little  
11 higher on 31, and in fact the bottom of page 30.

12 A. Okay.

13 Q. Do you see the -- the last sentence  
14 there, "if ACE American accepted coverage" --

15 THE COURT REPORTER: I am sorry, last  
16 sentence there, what is it?

17 BY MR. BELL:

18 Q. "If ACE American accepted coverage"; do  
19 you see where I am at?

20 A. Yes, I do.

21 Q. It says: ESIS then created a separate  
22 claim file (the "conflict file") and assigned  
23 the matter to a separate ESIS claim representative for  
24 further handling of TSC's defense.

25 A. Right, within -- within the deductible,

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1       that's right.

2               Q.       Okay. And what I am trying to understand  
3       is what -- what does that further handling TSC's  
4       defense, what does that entail?

5               A.       Basically monitoring the activities of  
6       defense counsel and liaising with ACE to the extent any  
7       of that liaising will be of assistance to UniFirst with  
8       regard to the resolution of the claim.

9               Q.       Gotcha.  
10              The further handling of TSC's defense,  
11       that is on behalf of UniFirst, right?

12              A.       Well, under the indemnity provisions of  
13       the contract -- of the contract between UniFirst and  
14       Tractor Supply.

15              Q.       Were you done?

16              A.       Yes.

17              Q.       Oh, okay, I am sorry. I didn't know if  
18       you had finished your answer.

19              Okay. So -- so what do you mean with  
20       respect to the indemnity obligations?

21              A.       There is an indemnity -- a mutual  
22       indemnity provision within the contract for the Textile  
23       Services Agreement of flat goods between UniFirst and  
24       Tractor Supply. And part of that would be UniFirst's  
25       obligation to indemnify Tractor Supply in the event

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1       there was a defect or negligence with regard to any of  
2       its mats that were rented to Tractor Supply.

3               Q.       I gotcha.

4                       So let me ask you -- let me ask you this.  
5       Is the -- when you say for further handling of TSC's  
6       defense, are you talking about TSC's defense under the  
7       indemnity obligation or TSC's defense under the  
8       additional insured coverage?

9               A.       Well, the additional --

10                      MR. WARRINGTON:   Form.

11                      THE WITNESS:   -- additional insured -- I  
12       am not making any coverage determinations here or  
13       interpreting the policy, but the way my  
14       understanding worked -- is that the indemnity  
15       provision of the Textiles Services Agreement of  
16       flat goods required insurance provisions by  
17       UniFirst in order to indemnify Tractor Supply for  
18       various willful or other negligent activities of  
19       UniFirst.  And in those circumstances where an --  
20       an ESIS adjustor had conducted a liability  
21       investigation on behalf of UniFirst and found that  
22       there may have been a defect in a mat that had  
23       been rented to Tractor Supply and an additional  
24       insured tender by Tractor Supply to ACE, that's --  
25       on those occasions is where the defense would then

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1           be provided under a reservation of rights.

2       BY MR. BELL:

3           Q.       Gotcha.

4                    If you could turn with me to page 38 of  
5       your report.

6           A.       Okay.

7           Q.       I am talking to you about this bullet  
8       point in -- in the middle and then the first sub bullet  
9       point, "as noted above"; do you see that?

10          A.       Yes, I do.

11          Q.       It says: As noted above, there was no  
12       "arrangement" between ESIS and ACE American, and the  
13       record does not indicate there being one.

14                    Do you see that?

15          A.       I do.

16          Q.       And what I am trying to understand, when  
17       you say "there was no arrangement," what do you -- what  
18       do you mean that there wasn't any arrangement?

19          A.       Right. So what I -- what I am talking  
20       about here in this section of the Report are my  
21       responses to Mr. Fey's opinions. And one of the things  
22       that he commented on -- Mark, if you just go to the  
23       bullet point above the sub bullet that you just  
24       mentioned.

25          Q.       Sure.

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1           A.           It provides Mr. Fey's comment that there  
2           was an arrangement between UniFirst, ESIS and ACE on  
3           the large deductible program and there just wasn't.  
4           There was no arrangement between UniFirst, ESIS and  
5           ACE. There was a contractual relationship between ACE  
6           and its policyholder, UniFirst. There was a separate  
7           and independent relationship between UniFirst and ESIS  
8           to act as its TPA to conduct investigations and other  
9           activities in concert with those provisions of the Risk  
10          Management Services Agreement in regard to those claims  
11          from patrons that were going in and out of Tractor  
12          Supply stores.

13                    So I think what Mr. Fey was confused  
14          about was I think he believed that there may have been  
15          some kind of arrangement between UniFirst, ESIS and  
16          ACE, and my comment on the sub bullet is, there simply  
17          wasn't; there is no indication in the record that there  
18          was; there is no indication in any of the deposition  
19          testimony, other than from Mr. Fey, that there was; and  
20          that, quite frankly, the RMS Agreement and the General  
21          Liability Services Instructions were the only  
22          contractual relationships that ESIS had with UniFirst.  
23          It had none of those similar type duties or  
24          responsibilities or arrangements with ACE, contrary to  
25          Mr. Fey's perception.

1 Q. I gotcha.

2 And so I guess maybe some of the  
3 confusion lies -- and this is maybe my own confusion,  
4 but ESIS -- or ACE -- ESIS is an affiliated company of  
5 ACE American, right?

6 A. That's my understanding.

7 Q. Okay. And so I think part of the  
8 confusion, potentially my confusion, is around ESIS  
9 because ACE -- my understanding at least is that ACE  
10 will sometimes hire ESIS to handle claims as a TPA on  
11 ACE's behalf; is that -- is that your understanding?

12 A. Yes.

13 Q. Okay. And so let's say, for instance,  
14 that UniFirst had hired Gallagher Bassett, just so  
15 that we -- just so that we don't have any confusion  
16 about the parties.

17 A. Okay.

18 Q. Are you with me?

19 A. I am.

20 Q. So in that situation, Gallagher Bassett  
21 in this hypothetical is UniFirst's TPA; are you with  
22 me?

23 A. Yes.

24 Q. And so if -- and let's say they have the  
25 same agreement between Gallagher Bassett as UniFirst --

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1 as exists between ESIS and UniFirst; are you with me?

2 A. Yes.

3 Q. In that situation if a conflict file  
4 needed -- needed to be opened, who would handle that  
5 conflict file; would it be Gallagher Bassett that  
6 handled the conflict file or would it be ESIS handling  
7 the conflict file?

8 MR. PULLIAM: Object to the form.

9 MR. WARRINGTON: Same.

10 THE COURT REPORTER: Wait, was that Mr.  
11 Pulliam?

12 MR. BELL: I think it was everyone.

13 MS. CHRISTOPHER: We all object.

14 MR. PULLIAM: Yes.

15 THE WITNESS: It -- it -- it is a little  
16 bit of an unwieldy question mark but let me see if  
17 I can break it down and see if -- if we can  
18 establish some agreement on an answer here.

19 If Gallagher Bassett was in the role of  
20 ESIS and had been contracted by UniFirst, right --

21 BY MR. BELL:

22 Q. Uh-huh.

23 A. -- that was your question?

24 Q. Yes.

25 A. There would have to be a separate

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1       adjustor already assigned and a separate firewall  
2       established, because Gallagher Bassett is also  
3       operating as a TPA of Tractor Supply Corporation.  
4       There is nothing wrong with a TPA handling a  
5       circumstance of two entities that find themselves  
6       involved in a contractual relationship and were under  
7       indemnity provision or an insurance provision, what  
8       have you, that one is tendering a defense request to  
9       the other. But in those circumstances there has to be  
10      a firewall between the claim professionals at Gallagher  
11      Bassett. And in that situation, yes, a conflict file  
12      would also have to have been set up at Gallagher  
13      Bassett, just as it was at ESIS, just as it was at ACE,  
14      in order to handle that particular claim.

15           Q.       Yeah, and you -- Mr. Heinze, you can call  
16      it -- one of the many inelegancies of the example I  
17      used in that using Gallagher Bassett you have a sort of  
18      different conflict that I wasn't trying to ask about  
19      but you answered that more precisely than I had asked  
20      it.

21                    Let me use a different example. Instead  
22      of Gallagher Bassett, let's say that the same  
23      hypothetical except UniFirst now has Sedgwick --

24           A.       Okay.

25           Q.       -- a separate independent TPA.

1           A.           Okay.

2           Q.           And in the situation -- so we have the  
3 same hypothetical, Sedgwick is UniFirst's TPA, they  
4 have the same agreement between UniFirst and Sedgwick  
5 as exists between Sedgwick and ESIS?

6           A.           And who is the carrier?

7           Q.           The carrier is ACE.

8           A.           Okay.

9           Q.           So same carrier ACE. In that situation a  
10 claim file -- a claim gets tendered to ACE and ACE --  
11 and a conflict file is set up. Is the conflict file  
12 managed by Sedgwick in this situation or is it managed  
13 by ESIS or some other TPA?

14          A.           It would be handled under ordinary  
15 customs and practices in the same manner as it was  
16 here, Mark. There would be a conflict file that would  
17 be set up by the TPA as well as by ACE in order to make  
18 sure that that claim was handled appropriately --

19          Q.           Gotcha.

20          A.           -- and reasonably.

21          Q.           And just so I am clear, though, you said  
22 there would be a conflict file set up by the TPA. Is  
23 that the TPA Sedgwick in this -- in this hypothetical?

24          A.           Yes, just as it was by ACE in real -- in  
25 the real life.

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1 Q. I gotcha, okay.

2 So -- so the fact -- so my understanding  
3 of your position is that the fact that ESIS and ACE  
4 might have had some other independent relationship,  
5 where ESIS handled some claims on behalf of ACE, had  
6 nothing to do -- had no role whatsoever in a conflict  
7 file from ESIS being assigned to these claims; is that  
8 right?

9 A. I understand --

10 MR. WARRINGTON: Object to form.

11 Excuse me.

12 THE WITNESS: That's quite all right, Al.

13 Mark, I absolutely understand your  
14 question and I understand where you are coming  
15 from. Let me see if I can explain it to you based  
16 upon how TPAs work with insurance carriers. You  
17 are right, there was, based upon my understanding,  
18 an affiliation between ESIS and ACE but that has  
19 absolutely nothing to do with the facts and  
20 circumstances of Plaintiff's Third Amended  
21 Complaint here or any of ESIS's activities with  
22 regard to its duties and responsibilities to its  
23 principal, and its only principal, which was  
24 UniFirst. It undertook those responsibilities in  
25 accordance with ordinary customs and practices of

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1 third-parties administrators that are under  
2 contract pursuant to a risk management services  
3 agreement. I have written those agreements, I  
4 have seen them, I have implemented them, I have  
5 audited them, it is the same ones like the ones  
6 that we have. And in those circumstances the  
7 ownership or the affiliation or the stock,  
8 whatever it may be, that ACE has with ESIS is  
9 totally separate and independent. And there is  
10 nothing, nothing that I have seen in this record  
11 where ESIS was not honorable to its  
12 responsibilities solely to UniFirst, and without  
13 any kind of feeling that it owed anything to ACE  
14 because it didn't, either contractually or in any  
15 other way.

16 BY MR. BELL:

17 Q. Got it.

18 And let me -- let me ask you this way.

19 In the last paragraph there in that -- in that same  
20 paragraph, it says: ESIS had no independent obligation  
21 to ACE American. Likewise, ESIS had no obligation to  
22 TSC.

23 Do you see that?

24 A. Yes.

25 Q. And are you saying -- does this statement

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1 hold true even with respect to the conflict files?

2 A. Yes.

3 Q. So even in the conflict files ESIS had no  
4 obligation to TSC?

5 A. Its obligation was to UniFirst.

6 Q. And it had no obligation to TSC?

7 A. No. The obligation to TSC was the  
8 defense that ACE provided under a reservation of  
9 rights. TSC had its own independent third-party  
10 administrator that was also looking at liability  
11 investigations and other activities on TSC's behalf.

12 Q. Now did -- did you see in the e-mails  
13 there are a number of e-mails from ESIS where it says:  
14 Esis Inc. is handling this -- this on behalf of Ace  
15 American Insurance Company.

16 Did you see those e-mails?

17 A. Could you show me one?

18 Q. Sure. Let me do this. This -- I know --  
19 I know these documents have been marked previously but  
20 I just don't -- I don't have them offhand, so we are  
21 going to go ahead and mark them again. At the next  
22 break I will get them uploaded but I am just going to  
23 show three of them here and I will give you all the  
24 numbers. And I am just going to share my screen if  
25 that works for you.

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1           A.       Yeah, sure.

2           Q.       I don't have them uploaded.

3           A.       Okay.

4           Q.       Share screen --

5                    Do you see -- do you see my screen,

6       Mr. Heinze?

7           A.       I do.

8           Q.       Okay. This is -- on the bottom it says:

9       ESIS 007043.

10                   Do you see that?

11          A.       I don't see the bottom of it, Mr. Bell,

12       but I see everything else.

13          Q.       Do you see it now?

14          A.       No.

15                   It's all right.

16          Q.       I will mark it for reference as ESIS

17       7043, but do you see it is Marcia Flagg to Keith

18       Barnes?

19          A.       Yes.

20          Q.       And this will be Exhibit 426 and it is

21       ESIS 7043.

22                   (Exhibit 426 - November 17, 2020 E-Mail.)

23                   THE WITNESS: Oh, there it is, okay; now

24       I see it at the bottom.

25

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1 BY MR. BELL:

2 Q. And then see here it says: Sincerely,  
3 Esis Inc.

4 And it says: Esis Inc. is handling this  
5 on behalf of Ace American Insurance Company.

6 Do you see that?

7 A. I do.

8 Q. And this is for claimant Vicki Parsons?

9 A. Yes, it is.

10 Q. Now when -- when you said they didn't  
11 have any relationship with ACE, how do you explain this  
12 language here, ESIS is handling this on behalf of ACE  
13 American Insurance Company?

14 A. In some states, Mark, there is a  
15 requirement that a third-party administrator place  
16 somewhere on its correspondence to the outside world  
17 who the statutory underwriting entity is, and that is  
18 what I believe this reference is to as well as in the  
19 other e-mails in which that reference appears. In my  
20 understanding there was an opportunity of the ESIS  
21 claim professionals to have a drop-down menu of their  
22 signature line. And I have the same thing in my  
23 company where if you are operating on behalf of someone  
24 and you are operating in a state which has those  
25 requirements, you can click on the drop-down menu to

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1 provide information transparently to the recipient of  
2 the communication that the statutory underwriting  
3 company is ACE American Insurance Company.

4 It is not correct that ESIS was handling  
5 the matter on behalf of ACE American Insurance Company,  
6 it is just what that signature line says as was  
7 statutorily, I think, required in some of the states.  
8 But from everything else in the record and from all of  
9 the testimony in the record, there was no indication  
10 that ESIS ever did any handling of this claim or any  
11 others on behalf of ACE American Insurance Company.  
12 All of its duties and responsibilities flowed solely  
13 and exclusively out of the Risk Management Services  
14 Agreement and the General Liability Services  
15 Instructions with UniFirst.

16 Q. All right. Mr. Heinze, we have been  
17 going for an hour and a half, I think now may be a good  
18 place to take a break. Do you want to take -- what do  
19 you want to take, five minutes, ten minutes?

20 A. I will tell you what, can we go off the  
21 record and we will have the discussion.

22 Q. Sure.

23 THE VIDEOGRAPHER: We are going off the  
24 record, the time is 10:28 a.m.

25 (Whereupon a break was held.)

1 THE VIDEOGRAPHER: We are returning to  
2 the record, the time is 10:42 a.m.

3 BY MR. BELL:

4 Q. Hi, Mr. Heinze.

5 A. Hi, Mr. Bell.

6 Q. On page -- turn to page 39 of your  
7 Report.

8 A. Okay.

9 Q. There is the second -- there -- the last  
10 sentence in that first bullet point of your language.

11 MR. PULLIAM: Graham, we are on page 39  
12 of his Report.

13 BY MR. BELL:

14 Q. Do you see that the last sentence of the  
15 first bullet point from your -- from your statement?

16 A. Yes.

17 Q. "ESIS never assigned the same claims  
18 handler to handle the claim against UniFirst and the  
19 claim against TSC."

20 Do you see that?

21 A. Yes.

22 Q. How -- how do you know that to be the  
23 case?

24 A. This refers to what I am saying in the  
25 Report that -- where ACE American accepted Tractor

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1 Supply's tender for a defense or coverage, that that  
2 conflict was -- file was opened up. So this is exactly  
3 that conflict situation, Mark, where a separate ESIS  
4 adjustor was continuing to do the liability  
5 investigation and the conflict adjustor was there, as I  
6 said, to monitor what was taking place in the defense  
7 of the claim and to pay the bills -- the defense  
8 counsel bills under the deductible program. So those  
9 are the -- what I am referring to there is the -- we  
10 are not handling -- not using the same adjustor to  
11 represent both entities in that type of a situation  
12 where ACE has agreed under a reservation of rights to  
13 accept the tender of defense and provide the tender.

14 Q. Understood. But how do you know that  
15 they -- that they never assigned the same claims  
16 handler to handle the claim against UniFirst and  
17 the claim against TSC?

18 A. Because from what I looked at in the  
19 record I did not see a -- the conflict adjustors at  
20 ESIS being the same person.

21 Q. How did you know whether it was a  
22 conflict -- whether the claim was being handled as a  
23 conflict file or as the UniFirst file?

24 A. Because it would have been in the claim  
25 files of those eight matters, I think it was Alissa

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1 Garrett; Barbara Holderness; Hathaway; Hammond; Munn --  
2 sorry, not Munn; Hammond; Atkinson; Brown; I don't  
3 remember the others, that where the tender of defense  
4 was accepted and the separate claim file was  
5 established for the purpose of the conflict file.

6 Q. And did you look through all eight claims  
7 from both the UniFirst claim handler and the ESIS -- or  
8 I am sorry, the conflict file?

9 A. Yes.

10 Q. What format were those documents in that  
11 you looked at?

12 A. In the Relativity Database.

13 Q. Did you look through any of the ACE claim  
14 files?

15 A. If they were in the Relativity Database,  
16 yes.

17 Q. Do you know what was in the Relativity  
18 Database?

19 A. I think it is everything that has been  
20 produced during the course of pretrial discovery.

21 Q. How long did that take you to go through  
22 all of those?

23 A. I think -- I -- I have not totalled up  
24 all the time yet but it is probably close to 120, 130  
25 hours by now.

1           Q.       Now did ESIS assign adjustors that had  
2 handled UniFirst matters to conflict files?

3           A.       I would have to go back and take a look,  
4 I don't recall.

5           Q.       Would -- would there be anything wrong  
6 with that?

7           A.       No.

8           Q.       And, again, ESIS -- because I guess ESIS  
9 had no duties to TSC anyway, right?

10          A.       Right. All of TSC's third-party  
11 administrative activities were undertaken by Gallagher  
12 Bassett, and its -- they also had separate defense  
13 counsel on their behalf looking out for their  
14 interests.

15          Q.       Who -- who opened a conflict file, ACE or  
16 ESIS?

17          A.       Most of the time both.

18          Q.       So there were two separate conflict files  
19 going on?

20          A.       That's my understanding, yes.

21          Q.       And then who -- who made the decision  
22 that a conflict file was needed at ESIS?

23          A.       When there was an acceptance by ACE of  
24 the tender under a reservation of rights.

25          Q.       And you would agree with me that ESIS was

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1 copied on communications with UniFirst about coverage  
2 decisions, right?

3 A. Yes.

4 Q. Did ESIS ever object to discussions  
5 between UniFirst and ACE concerning coverage decisions?

6 A. What do you mean by "object," Mark?

7 Q. Did they ever say, hey, guys -- you know,  
8 did they ever make any objection about, hey, this is,  
9 you know -- we shouldn't be having these conversations  
10 or otherwise?

11 A. No, I didn't see that.

12 Q. Should ESIS have objected to discussions  
13 between UniFirst and ACE concerning coverage decisions?

14 MR. BELL: Form.

15 MR. WARRINGTON: Object to the form.

16 THE WITNESS: There were no  
17 communications that I recall, Mark, where there  
18 were discussions of coverage. ESIS was copied on  
19 coverage determinations or drafts of coverage  
20 letters that would be provided, but they were not  
21 involved or engaged in making any of those  
22 coverage determinations.

23 BY MR. BELL:

24 Q. I want to show you a document that has  
25 previously been marked Exhibit 344; it should be in

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1 your share file now if you open it.

2 THE COURT REPORTER: What file -- what  
3 number is it?

4 MR. BELL: Exhibit 344.

5 THE COURT REPORTER: Thank you.

6 THE WITNESS: Okay, I have it.

7 BY MR. BELL:

8 Q. Do you see on this -- take as much time  
9 as you need to read it. Let me know when you have had  
10 a chance to review it.

11 A. Okay.

12 Okay, I have read it.

13 Q. Okay. So on the -- on the bottom of the  
14 first page there is an e-mail from Francesca Rivela; do  
15 you see that?

16 A. I do.

17 Q. And it says: Please find attached  
18 the denial letter for the above-referenced loss.  
19 Please review and let me know if you would like me to  
20 schedule a phone conference to discuss further with all  
21 applicable parties for the coverage determination.

22 Do you see that?

23 A. I do.

24 Q. So how do you say that there was not  
25 any -- that there was not any discussion with the --

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1 with UniFirst and ESIS concerning coverage  
2 determinations?

3 A. Well, all this tells me is that there is  
4 a question as to whether a telephone call should be  
5 scheduled, not that there was. And particularly I  
6 don't recall in reviewing the entirety of this record,  
7 Mark, where ESIS got involved in any kind of coverage  
8 determinations other than to perhaps offer information  
9 with regard to outstanding liability investigations  
10 that were taking place before a coverage letter would  
11 be issued but they did not get involved in interpreting  
12 the policy or in suggesting what should be or not be  
13 included in a reservation of rights letter or in a  
14 denial letter.

15 Q. Did -- so you -- ESIS didn't get involved  
16 in what should be in a reservation of rights letter or  
17 a denial letter; is that right?

18 A. That's right.

19 Q. Was UniFirst involved in what should be  
20 in a denial letter or a reservation of rights letter?

21 MR. PULLIAM: Object to the form.

22 THE WITNESS: I think this letter speaks  
23 for itself in terms of what Ms. Rivero is  
24 referring to but, again, this is more a comment  
25 with regard to a liability situation as opposed to

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1           interpreting whether a particular coverage grant  
2           or insuring agreement or exclusion or endorsement  
3           applies.

4       BY MR. BELL:

5           Q.           But this -- this is also speaking to the  
6           liability issue, is it not?

7           A.           Yes.

8           MR. PULLIAM:   Object to form.

9           THE WITNESS:   I mean, the letter speaks  
10          for itself but it basically has Ms. Rivela sending  
11          a denial letter to the recipients and asking  
12          whether there should be a telephone call.

13       BY MR. BELL:

14          Q.           Right.   And if we scroll up to the next  
15          e-mail, it is an e-mail from Ms. Rivero to Ms. Rivela,  
16          right?

17          A.           Right.

18          Q.           And Ms. Rivero is at UniFirst?

19          A.           Right.

20          Q.           And she says:   Under "The Claim":   We  
21          cannot say that "It is our understanding UniFirst  
22          delivered the mat in question...".   I would suggest  
23          replacing this by saying something to the effect that  
24          UniFirst had completed a delivery of mats to Tractor  
25          Supply 9/04/18 prior to the alleged accident [sic].   If

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1 the mat at issue is later determined to be a UniFirst  
2 mat, it would have been in...

3 And then below it says: Again, we cannot  
4 admit this involves our mat and as such would not want  
5 to make any admission of facts that we would find  
6 ourselves later having to defend because of this error.

7 Do you see all of that?

8 A. I do.

9 Q. And so this is -- you would agree with  
10 me, this is related to UniFirst's liability; is that  
11 right?

12 MR. PULLIAM: Object to the form.

13 THE WITNESS: Yes.

14 BY MR. BELL:

15 Q. And is it ESIS's job to determine the  
16 liability of UniFirst?

17 A. ESIS is the collection of information  
18 after which a review of a liability determination can  
19 be made, so they are involved in the process of  
20 collecting the facts, undertaking the investigation and  
21 making a recommendation in their responsibilities under  
22 the Services Agreement to UniFirst.

23 Q. The changes here, would you not agree  
24 with me, that this has an impact on coverage for  
25 Tractor Supply?

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1 MR. PULLIAM: Object to the form.

2 MR. WARRINGTON: Join.

3 THE WITNESS: No. The letter --  
4 the e-mail and the letter and the wording that is  
5 used speak for themselves, but the way I reviewed  
6 it when I read it was that this was information  
7 that Ms. Rivero was communicating to Ms. Rivela in  
8 terms of what should be included in the letter as  
9 respects any potential liability of UniFirst based  
10 upon the demands that were made and the  
11 information that had been collected.

12 BY MR. BELL:

13 Q. So you don't think that this letter has  
14 an impact on coverage?

15 MR. PULLIAM: Object to the form.

16 THE WITNESS: I don't believe this letter  
17 has an impact on coverage standing in itself. The  
18 coverage issues and the facts pertaining to  
19 liability are two separate things. The facts  
20 pertaining to liability had been -- had  
21 collected -- collected by ESIS and provided to  
22 UniFirst. Once the tender was received, ACE then  
23 took that information, reviewed it, and wanted to  
24 have a letter denying coverage set forth, but this  
25 particular language here relates to a potential

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1 liability and not with regard to coverage.

2 Coverage is separate and distinct from liability.

3 BY MR. BELL:

4 Q. All right. The next document I want to  
5 show you is Exhibit -- it has been previously marked  
6 Exhibit 343, you should have it in your folder.

7 A. I do.

8 Q. Do you see it okay?

9 A. Yes.

10 Q. Okay. Just let me know after you have  
11 had a chance to review it.

12 A. Okay.

13 Q. I am not going to ask you the details of  
14 what Marcia Flagg said in all of her writings, so I am  
15 not -- it is not a memory quiz on that, but I just want  
16 you to be able to review it.

17 A. All right. So we are going to look at  
18 the second page, then, as opposed to the first, right?

19 Q. We are going to look at both pages.

20 A. Okay. Where would you like me to start?

21 Q. Just on this -- this Marcia Flagg e-mail,  
22 April 12th, 2018.

23 A. Okay.

24 Q. The subject: NEW carrier referral to  
25 address tender, our client: UniFirst Corporation,

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1 Claim --  
2 -- claim number, date of loss, et cetera,  
3 et cetera.  
4 A. Right, the Patricia Padgett claim.  
5 Q. Yeah. And then there is a description of  
6 the accident, right?  
7 A. Yes.  
8 Q. There is a result of investigation  
9 and liability assessment.  
10 A. Correct.  
11 Q. And then there is some additional notes  
12 and details and descriptions of the incident.  
13 A. Pertaining to the video that was  
14 reviewed.  
15 Q. Right.  
16 A. Yes.  
17 Q. Okay. And then the next e-mail is an  
18 e-mail from Gregg Aronson to Marcia Flagg. And Marcia  
19 Flagg is at ESIS, right?  
20 A. Yes.  
21 Q. Okay. And he says, "Chubb file is" --  
22 that claim number. "I'll send you a proposed letter.  
23 Contact me with any questions."  
24 Do you see that?  
25 A. I do.



1 Q. And then it says -- the next e-mail is  
2 Marcia and Margarita, "Please see attached proposed  
3 response to the tender. Let me know your thoughts.  
4 Thanks."

5 And then Ms. Rivero responds, "We agree  
6 with the attached response to the tender, please  
7 proceed as outlined. Can you please add Barbara  
8 Christman to the distribution list?"

9 Do you see all of that?

10 A. I do.

11 Q. So in this situation we are -- was  
12 there -- was ACE influenced by any investigation of the  
13 incident conducted by ESIS?

14 MR. PULLIAM: Object to the form.

15 THE WITNESS: To whatever extent a  
16 coverage determination was made by Mr. Aronson  
17 with regard to information that he had received  
18 pursuant to the liability investigation ESIS had  
19 conducted for UniFirst would have to be a question  
20 that would be asked to Mr. Aronson. I did not see  
21 in my review of the record that any of the  
22 liability investigation adversely or prospectively  
23 caused ACE to make a determination as to what its  
24 coverage grant provided coverage for or did not  
25 provide coverage for to Tractor Supply; those were

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1           separate decisions that were made.

2

3       BY MR. BELL:

4           Q.       So do you think that -- that the -- did  
5       the -- that investigation and report and description by  
6       ESIS, did that have any bearing on ACE's determination  
7       on liability?

8           A.       It may have.

9           Q.       Okay. And so if I can go back to your  
10      Report to page -- back to page 39 on Exhibit 425; are  
11      you with me?

12          A.       Yes.

13          Q.       Okay. On the second bullet point there  
14      of what you have written, you said: There is no  
15      indication in any of the claim files that the actions  
16      and decisions by the claim professionals at ACE  
17      American were influenced by any conduct, activity or  
18      factual investigation of the incident conducted by  
19      ESIS.

20                    Do you see that?

21          A.       I do.

22          Q.       How do you square that statement with,  
23      for instance, that e-mail that we just looked at?

24          A.       Because what ACE is doing is responding  
25      to a tender of defense and making a coverage

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1 determination based upon the information they have  
2 before them. The information that they have was  
3 collected under the generally accepted customs and  
4 practices of third-party administrators and claim  
5 professionals in trying to determine through video  
6 evidence, interviewing of witnesses, information  
7 received from Gallagher Bassett and Tractor Supply with  
8 regard to how this incident occurred; that information  
9 is then provided and a coverage determination is then  
10 made.

11 I did not see anything in the liability  
12 investigation conducted by ESIS on behalf of UniFirst  
13 that influenced or in any other way caused ACE to take  
14 a particular coverage position. That was something  
15 that ACE did on their own based upon the clear and  
16 express language of the coverage grants, endorsements  
17 and exclusions and definitions of their policy.

18 Q. Okay. So -- but the statement you said  
19 here is that: There is no indication in any of the  
20 claim files that the actions and decisions by the claim  
21 professionals at ACE American were influenced by any  
22 conduct, activity or factual investigation in the  
23 incident conducted by ESIS.

24 Do you see that?

25 A. Correct. I do.

1 Q. How -- how do you -- what do you mean  
2 that ESIS' factual investigations didn't impact any  
3 decision made by ACE?

4 A. What I am saying is that they did not  
5 influence the conduct, activity that ACE undertook with  
6 regard to determining whether or not to accept the  
7 tender under a reservation of rights pursuant to the  
8 terms, conditions and exclusions of its policies.

9 Q. Okay. So -- so would you -- would you  
10 qualify or clarify this paragraph to say that this as  
11 it relates to coverage decisions?

12 A. Yes.

13 Q. Okay.

14 A. That's what I -- that's what I am  
15 responding to here. That if you look at Mr. Fey's  
16 initial bullet point at the top, it talks about ACE  
17 denying Tractor Supply's additional insured status and  
18 that those were based upon ESIS's claim investigation  
19 and directly influenced by UniFirst as evidenced by the  
20 communications. He doesn't cite to any but it is  
21 something that is related back to the report that he  
22 has provided. And as I looked at this, Mark, I did not  
23 see any factual investigation that was conducted by the  
24 ESIS claim professionals on behalf of UniFirst that  
25 adversely or proactively influenced ACE to make a

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1 coverage determination based upon their independent  
2 evaluation of the information they had before them at  
3 the time.

4 Q. You are talking about the independent  
5 investigation; the information for that independent  
6 investigation that ACE conducted, where did that  
7 information come from?

8 A. Well, it came from a variety of sources.  
9 It came from Gallagher Bassett, it came from Tractor  
10 Supply and it came from ESIS.

11 Q. And do you see any communications about  
12 individual claims and background from Tractor Supply to  
13 ACE directly?

14 A. No, everything went through Gallagher  
15 Bassett and ESIS. But when you asked me what  
16 information they reviewed, that is a collection of  
17 information that they took from the sources from which  
18 it was received.

19 Q. Let me ask you this. In Relativity,  
20 going through all of those documents, did you see  
21 anywhere in -- in the documents any investigation into  
22 liability conducted by an ACE representative?

23 A. I would have to go back and take a look,  
24 Mark, I honestly don't recall.

25 Q. You don't recall any sitting here today,

1 right?

2 A. Right.

3 Q. But you do recall --

4 A. There are 60 claims that were tendered  
5 and 50 -- over 50,000 documents that I reviewed. I  
6 would have to go back and take a look to research your  
7 question.

8 Q. But you -- you do recall seeing that  
9 there was investigations into liability conducted by  
10 ESIS for the files -- or for the claims?

11 A. That was conducted by ESIS as well as by  
12 Gallagher Bassett on behalf of Tractor Supply, that's  
13 correct.

14 Q. Sure, okay.

15 So if you don't recall any investigation  
16 being conducted by ACE --

17 A. I didn't say that.

18 Q. Oh, what did you say?

19 A. I just -- I just said I don't recall  
20 sitting here today whether there were any.

21 Q. Okay. So you don't recall sitting here  
22 today whether there was any investigation by ACE into  
23 the liability for each of these individual claims?

24 A. Whether there was or there wasn't, I just  
25 don't recall sitting here at the moment. I would have

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1 to go back through the record and take a look.

2 Q. Let me ask you this. Should ACE have  
3 done its own investigation into the liability?

4 A. It depends upon whether the ACE adjustor  
5 making a determination in response to the tender of  
6 defense by Tractor Supply believed that additional  
7 information was necessary or whether it had independent  
8 information from the investigation that had been  
9 collected on which to make that determination.

10 Q. And the information it would have -- the  
11 independent information would have come from either, I  
12 think you said, and correct me if I am wrong, Gallagher  
13 Bassett or ESIS?

14 A. Or Tractor Supply.

15 Q. Or Tractor Supply.

16 A. Right. I mean, I did not see any  
17 objection by Tractor Supply in regard to the underlying  
18 facts and circumstances pertaining to the claims that  
19 were asserted due to the mats in the record documents  
20 that I reviewed.

21 Q. Would you agree with me that ACE then, at  
22 least in some of the claims, relied on information  
23 provided to it from ESIS?

24 A. I think ACE took into consideration --  
25 and, again, this would have to be something that would

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1 be asked of the ACE representatives, but from what I  
2 reviewed I believe that the ACE claim professionals  
3 certainly considered the information they had before  
4 them at the time in making their coverage  
5 determinations.

6 Q. And so, I guess, taking that as true, I  
7 don't understand how you can say that -- that the  
8 actions and decisions by ACE weren't influenced by  
9 ESIS?

10 A. Because ACE is making its own coverage  
11 determination separate and apart from the information  
12 that is receiving -- that it is receiving based upon  
13 the liability investigation that has been conducted.

14 Q. What impact did the liability decisions  
15 have on coverage decisions?

16 A. The investigation and the facts and  
17 circumstances that were obtained were reviewed by the  
18 ACE claim professionals in reaching -- among other  
19 things, in making their determinations as to coverage.

20 Q. In certain -- in certain letters from  
21 ACE, in tender response letters, there is information  
22 in there that says the mat was in the care, custody  
23 and control of Tractor Supply for a certain number of  
24 days; do you agree with me on that?

25 A. I do.



1 Q. That information came from ESIS, did it  
2 not?

3 A. No, the information -- well, the  
4 information came either from Tractor Supply, which  
5 would had recorded the receipt of a mat based upon its  
6 delivery by UniFirst, or from UniFirst having made the  
7 delivery to that particular Tractor Supply retail  
8 location.

9 Again, as I said, ESIS did not have any  
10 skin in the game with regard to coverage decisions  
11 here. It collected the facts, as was its duty and  
12 responsibility under its Risk Management Services  
13 Agreement with UniFirst, and conducted its activities  
14 in accordance with that contract.

15 Q. Because you said that ESIS had no duties,  
16 obligations or otherwise with respect to ACE?

17 A. Right.

18 Q. On page 42 of the Report, the conclusion,  
19 it says --

20 A. Yes.

21 Q. -- it says: The most appropriate manner  
22 in which to examine the appropriateness of the  
23 challenged conduct of third-party administrators and  
24 its insurance professionals in the handling of  
25 insurance claims is not to selectively base an opinion

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1 upon individual e-mails, random facts or attempting to  
2 interpret selective provisions of an insurance policy  
3 without placing everything in context under -- excuse  
4 me -- the totality of circumstances.

5 Do you see that?

6 A. I do.

7 Q. What -- what does that -- what do you  
8 mean "the totality of circumstances"?

9 A. Looking at everything in a whole as  
10 opposed to selectively -- with all due respect to  
11 Mr. Fey, in reading his report and his deposition  
12 transcript, it appeared as though there were selective  
13 things that Mr. Fey was concentrating on or picking out  
14 -- cherry picking to make a point.

15 In my view the more appropriate way of  
16 doing this is on a more objective basis, to let the  
17 chips fall where they may and to examine the entirety  
18 of the record as a whole, and under those totality of  
19 all the circumstances, to then be able to render an  
20 opinion as I have in my Report.

21 Q. Would you agree with Mr. Fey that there  
22 are some e-mails that appear problematic?

23 A. No --

24 MR. WARRINGTON: Form.

25 THE WITNESS: -- not -- not when --

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1 I am sorry, Al.

2 -- not when you look at everything in the  
3 totality of circumstances, no, I do not.

4 BY MR. BELL:

5 Q. Without looking at everything, if you  
6 were to pick and choose sort of those random e-mails  
7 and things, would you agree that some of those do have  
8 the appearance of impropriety?

9 MR. WARRINGTON: Same objection.

10 THE WITNESS: That is a good question,  
11 Mark, and here is how I would respond to it.

12 In -- in these type of circumstances you  
13 can't look at things in a vacuum, you have to give  
14 context and definition to them. I can look at  
15 anything that I want and make a determination on  
16 something but based upon what is before it or  
17 after it, it is entirely wrong. So I have to go  
18 and look at everything that I have seen and then  
19 be able to render an objective opinion  
20 accordingly.

21 BY MR. BELL:

22 Q. Did you -- and did -- you didn't see any  
23 e-mails that appeared problematic in your -- in your  
24 view?

25 A. No, not under the totality of

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1 circumstances or when placed into their proper context.

2 Q. Okay. But taking them out of  
3 the totality of the circumstances, just the e-mails  
4 standing alone, anything that seemed problematic?

5 A. Again, Mark, as I have testified, I -- I  
6 can't do that. I -- I -- I can't just look at one  
7 thing and say, oh, this is good or this is bad. I  
8 could have equally have said, well, this is wonderful,  
9 this explains everything in just looking at that one  
10 single document when, in fact, there are a legion of  
11 things that came afterwards that give that an entirely  
12 different perspective. So, no, in looking at it from a  
13 totality of circumstances objectively, I did not see  
14 any e-mails that to me were problematic.

15 Q. When looked at in the context of the  
16 totality of the circumstances?

17 A. Correct.

18 Q. So let me ask you this. Who -- who  
19 should investigate liability determinations on behalf  
20 of ACE?

21 A. Well, I think as I have testified, those  
22 liability determinations on behalf of a claim that was  
23 tendered by Tractor Supply was first and foremost  
24 undertaken by ESIS claim professionals in accordance  
25 with their duties and responsibilities under the Risk

1 Service Management Agreement.

2 In the event additional information with  
3 regard to the acceptance of a tender of defense were  
4 required, the ACE claim professional would in all  
5 likelihood then undertake that investigation on their  
6 own or work through the appointed defense counsel under  
7 reservation of rights to further make those  
8 investigations and determinations.

9 Q. And then who should make decisions on --  
10 based -- or settlement authority -- or sorry let me ask  
11 it this way.

12 Who should make settlement decisions  
13 involving Tractor Supply as an additional insured?

14 MR. WARRINGTON: Form.

15 THE WITNESS: That would be done by an  
16 ACE representative because that is something that  
17 had then been tendered and defended under a  
18 reservation of rights.

19 BY MR. BELL:

20 Q. And what role would ESIS have in -- in --  
21 related to settlement of a Tractor Supply claim as an  
22 additional insured?

23 A. In the event there were such a  
24 settlement, the ESIS conflict adjustor would pay the  
25 defense bills and the liability adjustor in all

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1       likelihood would pay the settlement amount in  
2       accordance with the instructions and the claims fund  
3       that was established by UniFirst.

4               Q.       And you said a defense -- I thought you  
5       said the conflict adjustor and then the liability  
6       adjustor; is that what you said?

7               A.       Yes.

8               Q.       And the liability adjustor, is that the  
9       UniFirst adjustor?

10              A.       There are people at UniFirst, like  
11       Barbara Christman, who were involved in these type of  
12       situations on the denials of claims, but what I am  
13       talking about are the ESIS adjustors that are acting on  
14       behalf of UniFirst.

15              Q.       I gotcha. I gotcha, okay; ESIS adjustor  
16       on behalf of UniFirst. All right.

17                      So -- so, for instance, if we had a claim  
18       -- for instance, there was a settlement involving  
19       Mr. -- Mr. Maynard. Are you familiar with  
20       the Mr. Maynard claim?

21              A.       What was his first name?

22              Q.       Jerry?

23              A.       Jerry? Jerry Maynard. I remember the  
24       name, yes.

25              Q.       There was ultimately a settlement that

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1 was issued to Mr. Maynard; are you -- are you familiar  
2 with that?

3 A. Yes.

4 Q. Okay. So -- and some of the settlement  
5 was paid by Tractor Supply, some of it was paid by  
6 UniFirst; are you -- are you familiar with that?

7 A. There were joint settlements, yes; there  
8 were a number of those, uh-huh.

9 Q. So in that situation, how -- what role --  
10 and, for instance, the Maynard case, what role did ESIS  
11 have in obtaining settlement dollars for Tractor Supply  
12 as an additional insured?

13 A. I would have to go back and look at the  
14 file, Mark, and see what the communications were and  
15 what the instructions were.

16 Q. How should it have worked?

17 MR. WARRINGTON: Form.

18 THE WITNESS: It depends upon what was  
19 known at the time and the settlement decisions  
20 that were being conducted at the time.

21 BY MR. BELL:

22 Q. I understand that but as far as under the  
23 -- whether it be the -- RMS Agreement or otherwise,  
24 how -- how should it -- how should it play out in  
25 getting settlement dollars or settlement authority for

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1 Tractor Supply as an additional insured?

2 A. If the amount of money --

3 MR. PULLIAM: Object to the form.

4 THE WITNESS: Sorry.

5 -- if the amount of money that was used  
6 to settle was within the deductible of UniFirst,  
7 the money would be paid out of that deductible  
8 fund.

9 BY MR. BELL:

10 Q. And who controls that deductible fund?

11 A. UniFirst.

12 Q. So does the settlement -- the settlement  
13 dollars on behalf of Tractor Supply, do they have to  
14 come from UniFirst?

15 A. If it is within the \$500,000 or million  
16 dollar deductible depending upon the year, it would  
17 come out of that claims fund established by UniFirst.

18 Q. And who would make the decision to -- to  
19 settle a case for under that \$500,000 deductible  
20 amount?

21 A. It depends on the nature of the claim and  
22 what was being tendered.

23 Q. In the -- in this situation, in the  
24 Maynard situation?

25 A. Again, I would have to go back and take a

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1 look at the claim file and see. I don't want to make  
2 any suppositions of something that I know exists and  
3 will be easily explainable by the documents within the  
4 claim file itself.

5 Q. What information would you need to see to  
6 be able to make the determination on the Maynard file?

7 A. It is not a determination, it is actual  
8 -- just reciting what the facts are from the file of  
9 what actually happened.

10 Q. Like -- and when you say "facts from the  
11 file," what -- what file are you talking about?

12 A. The Maynard file that we are talking  
13 about.

14 Q. Gotcha. But what I am asking is, like,  
15 are you talking about the ESIS claim file notes, the  
16 ACE claim file notes, the conflict file notes; what are  
17 you talking about when you are talking about "the  
18 Maynard file"?

19 A. I would look at the documents in the  
20 Relativity database and see what the instructions were  
21 and how that settlement was agreed to and how it was  
22 funded.

23 Q. Okay. And when you say "what the  
24 instructions were," what do you mean "what the  
25 instructions were"?

1           A.           I believe under that -- under the Maynard  
2           file that ACE was defending Tractor Supply under a  
3           reservation of rights, and in that circumstance the ACE  
4           adjustor and the Tractor Supply/Gallagher Bassett  
5           folks, if this indeed was one that was settled with  
6           joint dollars, would work out who was paying how much  
7           and under what circumstances. The releases would then  
8           be prepared and exchanged and the dollars would be  
9           paid.

10          Q.           You said the -- I thought you said the  
11          ACE adjustor and Tractor Supply would work out who was  
12          paying what; is that what you said?

13          A.           Again, I would have to take a look to see  
14          in the actual claim file to see how it worked out. All  
15          I know from what I remember now is that this was a  
16          claim that had been tendered under the additional  
17          insured demand by Tractor Supply to ACE which accepted  
18          it under a reservation of rights.

19          Q.           And when I ask -- and I am not trying to  
20          be difficult but when you say you would need to see the  
21          claim file, I -- I am wondering what document -- when  
22          you say "I need to see the claim file," what -- what  
23          claim file do you need to see?

24          A.           I wanted to see the entire claim notes  
25          and file relating to Mr. Maynard's claim.

1 Q. So the entire claim notes and file from  
2 ESIS, UniFirst, Tractor Supply or from whom?

3 A. From what I recall there are -- there  
4 were three claims that were set up in Mr. Maynard's  
5 situation: One from ESIS, one from ACE and one by  
6 Gallagher Bassett. I would go back to each of those  
7 individual claim files and take a look to answer your  
8 question as to how that claim was amicably resolved and  
9 what the instructions were and how much each of the  
10 parties paid to fully indemnify his claim, in addition  
11 to the conflict file.

12 Q. So -- so you have some recollection of  
13 the Maynard file?

14 A. Only that it exists. And from what I  
15 have just told you, that's the best recollection I have  
16 for you.

17 Q. And do you have any recollection of it  
18 being settled ultimately for \$600,000?

19 A. Not off the top of my head, sorry, I  
20 don't.

21 Q. Okay. Assuming for the sake of argument  
22 it was settled for \$600,000; 300,000 paid by UniFirst,  
23 300,000 paid by Tractor Supply, how -- what -- what  
24 role would ESIS have in getting money from ACE to pay  
25 that settlement amount?

1 MS. CHRISTOPHER: Objection, form.

2 MR. WARRINGTON: Same.

3 THE WITNESS: I don't know that ISIS had  
4 money that was paid by ACE because that \$300,000  
5 would still fall within the UniFirst deductible  
6 but, again, I can't make any speculations without  
7 taking a look at the file itself and giving you a  
8 proper answer.

9 MR. BELL: Let's -- if we can, can we go  
10 off the record for five minutes; come back at  
11 11:30?

12 THE WITNESS: Sure.

13 THE VIDEOGRAPHER: We are off  
14 the record -- off the record at 11:24.

15 (Whereupon a break was held.)

16 THE VIDEOGRAPHER: We are returning to  
17 the record, the time is 11:34 a.m.

18 BY MR. BELL:

19 Q. Thanks -- thanks for staying with us,  
20 Mr. Heinze.

21 A. Sure, Mr. Bell.

22 Q. A question for you, on the -- did you  
23 review the expert report of Mr. Rambin?

24 A. Yes, as well as his deposition.

25 Q. Okay. He takes the position that if

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1 something is rented then there is no coverage under the  
2 CGL policy, did you -- did you see that?

3 A. I did.

4 Q. What is -- what is your thought related  
5 to that position?

6 A. I don't have a thought on the position  
7 because I was not requested to review any kind of  
8 coverage determinations or interpret the policy, so I  
9 have no opinion on that at all.

10 Q. But as a, you know, guy who has been  
11 doing this for 30-plus years, what are your -- what are  
12 your thoughts on it?

13 A. It is outside the scope of my retention,  
14 Mark, with respect -- and, therefore, I don't have any  
15 comment or opinion on it.

16 Q. Have you ever seen that position taken  
17 before by an insurer, that if something is rented there  
18 is no CGL coverage and it is not your product?

19 MR. WARRINGTON: Object to the form.

20 MR. PULLIAM: It mischaracterizes the  
21 testimony.

22 THE WITNESS: It would require me to look  
23 at coverage interpretations and the different  
24 wordings of different policies written by  
25 different insurers at different times based upon

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1 different claims and facts of those claims and the  
2 allegations that are made within the complaints of  
3 additional insured tenders that are being made.  
4 So it would depend upon a variety of factors that  
5 I just don't have before me and I am not able to  
6 make any further comment or opinion on that.

7 BY MR. BELL:

8 Q. Well, it -- it wouldn't require you to  
9 look at a bunch of different forms or anything, I don't  
10 think --

11 A. Well, you have asked me if I have seen it  
12 before so --

13 Q. Yeah.

14 A. -- again, under various circumstances  
15 over the past 40 years I don't -- I don't know whether  
16 it is something that I would have seen before but it is  
17 nothing that I have been asked to opine upon and it is  
18 beyond the scope of my retention.

19 Q. Okay. Because you agree with me that  
20 this is a standard ISO CG 00 01 form, right, that's at  
21 issue?

22 A. 00 01 CGL ISO form, that is the one that  
23 is at issue, yes.

24 THE COURT REPORTER: CG, I am sorry,  
25 what?

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1 THE WITNESS: CG 00, and then a space,  
2 and then 01.

3 THE COURT REPORTER: Thank you.

4 THE WITNESS: Uh-huh.

5 BY MR. BELL:

6 Q. And -- and the your-product language is  
7 unmodified standard ISO CGL language, right?

8 A. Again, I'll have to go back and take a  
9 look to see what endorsement was used with regard to  
10 the your-product and your-work exclusions but there are  
11 definitions within the policy that are standard ISO  
12 wordings.

13 Q. And I am just -- and I -- I am just  
14 asking if you have ever seen that -- that or a similar  
15 position taken before, that a rented product is not  
16 your product under the ISO CGL definition?

17 MR. PULLIAM: Object to the form.

18 THE WITNESS: Again, Mark, respectfully  
19 it is not anything that I have been asked to  
20 comment or opine upon and is beyond the scope of  
21 my retention, so I don't have any comment or  
22 opinion upon that at this time.

23 BY MR. BELL:

24 Q. I am just asking in 30 years if you have  
25 ever seen it before, I am not asking you whether you

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1 agree -- and this question is not asking whether you  
2 agree with Mr. Rambin or otherwise, I am just asking  
3 you if you have ever seen that position taken  
4 previously.

5 MR. WARRINGTON: Form.

6 THE WITNESS: Again, it is outside the  
7 scope of my Report and opinion, outside the scope  
8 of my retention, and I don't have any comment or  
9 opinion further with regard to over the past 40  
10 years whether I have ever seen a position like  
11 that taken before.

12 BY MR. BELL:

13 Q. So you have reserved the right to  
14 supplement the Report based on coverage  
15 interpretations, right?

16 A. I have reserved my right to supplement or  
17 amend my Report based upon any item that counsel may  
18 wish me to opine upon.

19 Q. And you mentioned that one of the things  
20 that you had reserved your right to supplement your  
21 Report is if Mr. Fey is allowed to testify as to  
22 coverage, right?

23 A. Correct.

24 Q. Okay. And so what I am asking you is if  
25 you are to supplement your Report based -- and to opine

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1 on the opinion of Mr. Rambin, what would your position  
2 be?

3 A. I have not been asked to render that  
4 opinion at this time and it is outside the scope of my  
5 retention, so I would have to go back and take a look  
6 and conduct that research and make that determination  
7 based upon my experience, training and knowledge.

8 Q. What research would you need to do?

9 A. I would need to take a look at what  
10 Mr. Rambin had said, take a look at the policy  
11 interpretation, conduct some legal research as to  
12 whether the common law of Florida or Tennessee have had  
13 any other types of interpretations of that wording and  
14 put it into the context of how Mr. Rambin has used it  
15 in his opinion and in his deposition testimony.

16 Q. And you said you would rely on your  
17 30-plus years of experience?

18 A. Yes.

19 Q. And that's what I am asking you, based  
20 upon your 30-plus years of experience, nothing is going  
21 to change between whether you have been asked to opine  
22 on that or not. But based on your experience, what is  
23 your -- what is your position with respect to whether a  
24 rented product is your work?

25 A. As I have testified, Mark, I don't have

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1 any opinion on that at this time. I would have to go  
2 back and formulate those opinions based upon a more  
3 intensive review of the information and the documents  
4 that would enable me to support that opinion under the  
5 totality of circumstances.

6 Q. Do you know Mr. Rambin?

7 A. Yes.

8 Q. And how do you know Mr. Rambin?

9 A. By reputation.

10 Q. Do you know him personally?

11 A. No.

12 Q. How -- how do you know him by reputation?

13 A. As a coverage counsel who is known in the  
14 insurance industry.

15 Q. I assume a positive impression?

16 A. Yes.

17 Q. I put into your folder Exhibit 415. Can  
18 you open that up and take a look.

19 A. Sure. Do you want me to page all the way  
20 to the bottom, or what would you like --

21 Q. Yeah, if you would just so you are  
22 familiar with it. Let me ask you if -- and let me know  
23 if you remember that document when you are reviewing  
24 it.

25 A. I do remember the document.

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1 Q. Okay.

2 MR. WARRINGTON: Excuse me, Mark, sorry  
3 to interrupt, I don't see a sticker on it. Is  
4 it --

5 MR. BELL: There is not a sticker on it.

6 MR. WARRINGTON: Oh, okay.

7 MR. BELL: You are right. It had been  
8 previously marked Exhibit 415 but it does not  
9 appear that there is a sticker on it, but it is  
10 ESIS 19202.

11 THE WITNESS: I remember seeing this,  
12 Mark.

13 BY MR. BELL:

14 Q. You do?

15 A. Yes.

16 Q. Okay. And what -- what do you remember  
17 about it?

18 A. That I have seen it.

19 Q. Okay. This is on the Downey claim; are  
20 you familiar with the Downey claim?

21 A. I am familiar with the fact that  
22 Mr. Downey made a claim, yes.

23 Q. Are you familiar with the settlement of  
24 the Downey claim?

25 A. Not off the top of my head but I do

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1 recall that Mr. Downey's claim did resolve.

2 Q. Then this one -- the -- I think I  
3 mentioned -- I mentioned Maynard earlier but Maynard  
4 was also settled but Downey is a different claim that  
5 was settled. And do you recall that Downey was settled  
6 for \$600,000?

7 A. Not specifically, no.

8 Q. Okay. Please scroll down to the bottom  
9 of page 19207.

10 A. Yes.

11 Q. And that's the first e-mail, it is an  
12 e-mail from Steve Beach to Bill Ruskin; do you see  
13 that?

14 A. Yes, yes.

15 THE COURT REPORTER: I am sorry, to who?

16 MR. BELL: Bill Ruskin.

17 BY MR. BELL:

18 Q. And do you -- do you know who Mr. Beach  
19 is?

20 A. A senior claims representative at ESIS.

21 Q. And is he handling the conflict file?

22 A. I don't recall.

23 Q. And, again, we see Steve Beach's e-mail,  
24 Senior AGL Claims Representative, and it says: ESIS on  
25 behalf of ACE American Insurance.

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1 Do you see that?

2 A. I do.

3 Q. And why did Mr. -- why would this  
4 language be on there, ACE on behalf of -- or "ESIS on  
5 behalf of ACE American Insurance"?

6 A. I think just like in the e-mail we saw a  
7 little bit earlier with regard to Ms. Flagg, it was  
8 either based upon a regulatory requirement to advise  
9 what statutory insurer is insuring the entities or it  
10 was just a mistake.

11 Q. And do you know who Mr. Ruskin is?

12 A. I believe he was the attorney on the  
13 case.

14 Q. That's right, yeah. The attorney for  
15 Tractor Supply?

16 A. I believe that's correct, yes.

17 Q. And then the first e-mail says: Bill,  
18 try Chubb rep below, Nicholas D. Maxymuik, Esq.

19 Do you see that?

20 A. Yes.

21 Q. Okay. All right. Then if you scroll up  
22 to the next e-mail, it starts on -- on 19205. Let me  
23 know when you are there.

24 A. I am there.

25 Q. Okay. It is an e-mail from Bill Ruskin

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1 to Nick Maxymuik at Chubb.

2 A. Yes.

3 Q. Okay. So this is on June 20th, 2023?

4 A. Yes.

5 Q. So --

6 A. 2022.

7 Q. What did I say?

8 A. '23.

9 Q. Ah, thank you, yes, 2022.

10 Do you see the second paragraph there?

11 A. Yes.

12 Q. It says: The purpose of our call will be  
13 to discuss whether Chubb would be willing to contribute  
14 to a settlement of the case without prejudice to its  
15 reservation of rights and its coverage position.

16 And it says, the next paragraph:  
17 The co-defendant in the case in UniFirst Corporation,  
18 which is also being defended by Chubb but with no  
19 reservation of rights. Plaintiff's demand in the case  
20 is an inflated 1.25 million to both defendants.

21 Do you see that?

22 A. Okay, sorry, you -- you skipped to the  
23 next paragraph; is that right?

24 Q. That's right, yes.

25 A. Okay, yes.

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1 Q. And so this would be the -- the demand  
2 would exceed the self-insured retention, right?

3 A. There is no self-insured retention --

4 Q. Sorry.

5 A. -- it was a high deductible program.

6 Q. Correct, thank you. But it would exceed  
7 the deductible, right?

8 A. That's right.

9 Q. Okay. And so when a claim like this is  
10 exceeding the deductible, what role does ESIS have with  
11 respect to obtaining settlement dollars for, for  
12 instance, the Downey claim on behalf of Tractor Supply?

13 A. Well, that's -- if -- if this is a tender  
14 that has been accepted as it appears, the defense was  
15 under reservation of rights, it would be ACE that is  
16 making that determination with regard to whether the  
17 matter can be amicably resolved based upon the  
18 allegations that are contained within the plaintiff's  
19 complaint, which is why they would have accepted the  
20 tender under reservation of rights in the first place.

21 Q. So -- so would ACE make the decision as  
22 to the amount of settlement dollars to pay?

23 A. Well, I --

24 MR. WARRINGTON: Form.

25 THE WITNESS: I am sorry, Al.

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1 MR. WARRINGTON: Object to the form.

2 THE WITNESS: It would be something --  
3 again, I would have to take a look at the entirety  
4 of the file, Mark, but it would be something that  
5 in all likelihood would have been done in  
6 conjunction with also defense counsel that was  
7 appointed under the reservation of rights and a  
8 review of the demands that were being made and the  
9 various specials in the claim that are being  
10 asserted and whether a matter could be amicably  
11 resolved based on those circumstances.

12 BY MR. BELL:

13 Q. And then as far as if the settlement was  
14 below \$500,000, who would determine the amount of money  
15 to pay on behalf of Tractor Supply towards that  
16 settlement?

17 A. Again, I would have to take a look at the  
18 claim file to see what the discussions were among the  
19 parties, but if Tractor Supply in conjunction with  
20 Gallagher Bassett decided what they would want to  
21 contribute, if anything, or -- and/or if they wanted to  
22 have the ACE adjustor -- a conflict adjustor determine  
23 in the ongoing discussions with counsel what the  
24 appropriate amount would be, those would be the types  
25 of communications that would be taking place.

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1 Q. Okay. And what role would ESIS have in  
2 those discussions, if any?

3 A. I am not aware that they would have any  
4 role in those discussions because their duties and  
5 responsibilities run to UniFirst with regard to the  
6 review of the liability that UniFirst might have with  
7 regard to Mr. Downey's claim.

8 Q. And what I am trying to understand is, I  
9 thought you had said earlier, and I might have just  
10 misunderstood, that UniFirst makes the decisions for  
11 amounts under \$500,000; is that -- is that right?

12 A. It depends --

13 MR. PULLIAM: Object --

14 THE WITNESS: I am sorry.

15 MR. PULLIAM: Objection to form.

16 THE WITNESS: -- it depends on whether  
17 there is a tender of an additional insured status  
18 that is being requested by Tractor Supply. ESIS  
19 has a certain amount of monetary settlement  
20 authority under the RMS Agreement that it can use  
21 to settle claims on behalf of UniFirst. Over  
22 those amounts, and within its deductible, UniFirst  
23 makes those determinations.

24 In this situation where it appears there  
25 has been a tender of an additional insurance

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1 status request and accepted by ACE under a  
2 reservation of rights, ACE would certainly be  
3 involved in making those discussions with regard  
4 to how much to contribute on behalf of UniFirst  
5 towards settlement.

6 BY MR. BELL:

7 Q. Okay -- but I hear what you are saying.  
8 And, again, assuming the situation is a tender of AI  
9 status, it has been defended under reservation of  
10 rights, I thought you had said that -- that ACE would  
11 be involved with respect to the settlement as to  
12 UniFirst?

13 A. Yes.

14 Q. But what about --

15 MR. PULLIAM: Object to the form.

16 THE COURT REPORTER: Who just said that?

17 MR. PULLIAM: Andy Pulliam.

18 BY MR. BELL:

19 Q. But with respect to Tractor Supply, what  
20 role would UniFirst have?

21 A. If the additional insured tender has been  
22 accepted by ACE under a reservation of rights, ACE  
23 would be involved in making those decisions, and in its  
24 discussions with UniFirst as I have seen within the  
25 file where those communications are taking place.

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1 Q. ACE would discuss with UniFirst the  
2 amount to pay on behalf of Tractor Supply in a  
3 settlement?

4 MR. PULLIAM: Object to the form.

5 THE WITNESS: Again, I have to go back  
6 into the file and see exactly what was done in  
7 this situation and who made settlement  
8 communications and where the authorities were and  
9 to whom they were given.

10 BY MR. BELL:

11 Q. Okay. So looking at this -- so in  
12 Downey -- let's just talk about Downey specifically.  
13 Downey is a case where ACE is defending under a  
14 reservation of rights, right?

15 A. Pursuant to the allegations set forth in  
16 Mr. Downey's Complaint.

17 Q. Right. So in the Downey situation, what  
18 role would ESIS have in determining the settlement  
19 amount payable on behalf of Tractor Supply by ACE?

20 MR. WARRINGTON: Object to the form.

21 THE WITNESS: Again, to answer the  
22 question specifically, I would go back to the file  
23 and determine what the file shows with regard to  
24 the communications between the parties that are  
25 involved. In this situation, however, since

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1           ESIS's responsibilities under the RMS Agreement  
2           run solely to UniFirst corporation, in all  
3           likelihood it would not be involved in making  
4           determinations as to how much settlement authority  
5           should be contributed on behalf of Tractor Supply  
6           in its role as a prospective additional insured  
7           under the ACE policy under a reservation of  
8           rights.

9       BY MR. BELL:

10           Q.       And, again, you would need to see the  
11           file from ESIS and the file from Tractor Supply?

12           A.       And from ACE.

13           Q.       And from ACE.

14           A.       And in all likelihood, since it relates  
15           to Tractor Supply, I believe, if I am not mistaken,  
16           there was also a Gallagher Bassett file that was also  
17           established.

18           Q.       All right. So scrolling up in this  
19           e-mail, go to the next e-mail from Bill Ruskin, June  
20           24th at 4:12; do you see that?

21           A.       Yes.

22           Q.       It says: Hi Nicholas, I am available  
23           this coming Monday or --

24                   THE COURT REPORTER: I am sorry. I am  
25           sorry, Mark, I am having a really tough time with

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1           those.

2                   MR. BELL:   Yeah.

3       BY MR. BELL:

4           Q.       He says, the second sentence:  If there  
5       is someone else at ACE -- Chubb/ACE that I should be  
6       speaking with about the settlement of this matter on  
7       behalf of Tractor Supply Company, an additional named  
8       insured on your policy, kindly advise me.

9                   Do you to see that?

10          A.       I do.

11          Q.       So Mr. Ruskin here is asking the Chubb  
12       representative for settlement authority, right?

13                  MR. WARRINGTON:  Form.

14                 THE WITNESS:  No, what he is saying is  
15       that he is available to speak with him on either a  
16       following Monday or Tuesday afternoon since  
17       e-mails were written on a Friday.  But if there  
18       was someone else at the insurance company that he  
19       should be speaking with about the settlement on  
20       behalf of Tractor Supply, that he would like to be  
21       informed of that.

22       BY MR. BELL:

23           Q.       The next e-mail is from Mr. Maxymuik to  
24       Mr. Beach.

25          A.       Yes.

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1 Q. Do you see that?

2 A. Yes.

3 Q. He says: Steve, I need to talk to you  
4 about -- first about this claim before speaking with  
5 Mr. Ruskin. I have called and left a message on your  
6 voicemail. Call me Monday so I can discuss this newly  
7 assigned claim to me first and then I will reach out to  
8 Mr. Ruskin depending upon our conversation. Depending  
9 upon my initial conversation with Steve, it may be  
10 beneficial for the three of us to have a phone call.

11 Do you see that?

12 A. I do.

13 Q. Why -- if ESIS's role is just monitoring  
14 the claim, as you said it was in a conflict file,  
15 right?

16 A. And to -- and also for the conflict  
17 adjustor to pay the bills.

18 Q. Pay the bills, okay.

19 Why would Chubb need to speak with ESIS's  
20 conflict adjustor in this matter?

21 A. Well, I think you need to read the second  
22 -- the next part of the e-mail here where he says:  
23 Steve - is this case still well within the \$500KSIR --  
24 which is not correct -- and if so, what is the reason  
25 for my involvement at this stage. I was just

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1 reassigned this claim and want to get the "lay of the  
2 land" by my conversation first with the insured's TPA,  
3 close quote.

4 So here Mr. Maxymuik is clearly stating  
5 that he wants to get more information, get the lay of  
6 the land, understand a little bit more before he has  
7 the conversation with Gallagher Bassett.

8 Q. And if the claim was within the \$500,000  
9 SIR, who would make the determination as to settlement  
10 dollars on behalf of Tractor Supply in the Downey case?

11 MR. PULLIAM: Object to the form.

12 THE WITNESS: Again, as I have testified  
13 before, Mark, my understanding is that where ACE  
14 has agreed to accept a tender of an additional  
15 insured under a reservation of rights based upon  
16 the allegations set forth within that claimant's  
17 complaint, the decision with regard to settlement  
18 and the nature and extent of settlement would be  
19 undertaken by ACE.

20 BY MR. BELL:

21 Q. Okay. Got it.

22 So that -- that -- that's the case even  
23 if the amount of settlement to be paid is within the  
24 \$500,000 deductible?

25 MR. PULLIAM: Object to the form.

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1                   THE WITNESS: In the event that there has  
2                   been an additional insured tender, an acceptance  
3                   of that tender under a reservation of rights,  
4                   that is my understanding.

5       BY MR. BELL:

6               Q.           And that's your understanding of -- of  
7               what happened or what should have happened or both?

8               A.           That's my understanding of what happened.

9               Q.           And what -- what -- from industry  
10              perspective, what should happen?

11              A.           Well, that depends upon what the nature  
12              and extent of the contractual responsibilities and  
13              duties are of the third-party administrator and any of  
14              the general liability special handling instructions  
15              they may have been provided, and the instructions they  
16              have been given. It also depends upon the nature and  
17              extent of the coverage evaluation that is conducted by  
18              the insurance carrier based upon the allegations set  
19              forth in the claimant's complaint and whether or not  
20              they wish to accept that tender based upon a  
21              reservation of rights.

22              Q.           Okay. But you -- you said that the  
23              contractual obligations and everything, you know what  
24              all of those contractual obligations are in this case,  
25              right?

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1           A.           Yes.

2           Q.           Okay. And so, what -- so what -- I am  
3 asking again, what -- that is -- you described what did  
4 happen in this situation, and then what I am asking is  
5 what should happen in the typical -- the typical  
6 situation involving this type -- in this type of  
7 situation?

8           A.           Exactly what happened here.

9           Q.           Okay. All right. And then the next  
10 e-mail is from Mr. Ruskin to Mr. Maxymuik on June 25th,  
11 2022; are you with me on that one?

12          A.           I am.

13          Q.           So the second paragraph says: As I  
14 understand it, the applicable ACE policy does not have  
15 an SIR, but rather has a deductible under the policy  
16 that applies to this 1/26/18 date of loss.

17                       And it continues, and then it picks up  
18 again: Regardless, it is a deductible...

19                       Do you -- do you see that?

20          A.           I do.

21          Q.           "Regardless, it is a deductible to be  
22 reimbursed solely by UniFirst after the claim is over,  
23 not a self-insured retention as you referenced below.  
24 I just wanted to clear that up and make sure that you  
25 appreciate that ACE's obligations to Tractor Supply

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1 Company exists now and they are not in any way affected  
2 by any deductible that UniFirst owes as reimbursement  
3 under the policy."

4 Do you see all of that?

5 A. I do.

6 Q. Do -- do you agree with Mr. Ruskin's  
7 statement there?

8 A. As to what, that this is not a  
9 self-insured retention? I do agree with that and  
10 that it is a deductible and that the obligations of ACE  
11 are not affected by the deductible program. It is just  
12 a matter that, as he says in that last sentence: In  
13 other words, Tractor Supply Company is entitled to  
14 additional insured coverage from ACE as determined by  
15 ACE, not UniFirst.

16 Q. Got it, okay.

17 And then he concludes it by saying: I am  
18 requesting settlement authority from ACE on behalf of  
19 Tractor Supply Company.

20 Do you see that?

21 A. I do.

22 Q. And ultimately -- ultimately ACE then  
23 would make the decision of what dollars to pay on  
24 behalf of Tractor Supply in a settlement under  
25 the policy; is that right?

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1           A.           Yes.

2           Q.           Okay. And ESIS would not have any role  
3 in that; is that right?

4           A.           First of all, let me just go back. Under  
5 a reservation of rights they would do that, correct.

6           Q.           Sure.

7           A.           And ESIS would have no role in that.

8           Q.           Okay. Got it, all right.

9                       Did you -- in your Report, did you -- do  
10 you have any opinions with respect to the claims  
11 handling done by ACE?

12           A.           No, I was not asked to look at that and  
13 that would be beyond the scope of my retention. My  
14 retention was specifically, as I described in my  
15 report, to look at the entirety of the record and to  
16 render an objective view as to whether the actions and  
17 conduct of ESIS and its claim professionals were within  
18 the generally accepted insurance industry customs and  
19 practices and the standard of care.

20           Q.           Okay. All right. And so, then -- then  
21 if I ask you any questions about the -- ACE's handling,  
22 would you -- what would be your response?

23           A.           That it would be beyond the scope of my  
24 retention.

25           Q.           And if I asked you, hey, based on your

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1 experience of 30 years and everything else, would that  
2 be your -- your response?

3 A. Yes.

4 Q. Okay. You had mentioned earlier the  
5 right to supplement your Report. Is there -- based on  
6 our discussions is there anything that you intend to  
7 supplement?

8 A. As a matter of fact there is; thank you  
9 for asking.

10 If -- can I refer you, Mark, to page 40  
11 of my Report.

12 Q. Yes.

13 A. Let me know when you are there.

14 Q. I am there.

15 A. Okay. That first large bullet point,  
16 there is a sub bullet that starts "the record  
17 documents"; do you see that?

18 Q. I do.

19 A. If I go down to the sentence that starts  
20 on the left-hand margin "that the ACE policy with  
21 Tractor Supply," Tractor Supply should say UniFirst.

22 Q. I gotcha, okay. That the ACE policy --  
23 yeah, understood.

24 A. I made a typographical error there, I am  
25 sorry.

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1 Q. No worries.

2 Is there anything else that you would  
3 like to supplement as of now?

4 A. Not at this time, thank you.

5 Q. Do you anticipate supplementing your  
6 report?

7 A. It would depend upon my further  
8 conversations with counsel and what they would ask me  
9 to do, and if that were to happen then I am sure we  
10 would have the opportunity of seeing one another again.

11 Q. Okay. And as of now you are not going to  
12 be opining on anyone else's potential liabilities other  
13 than ESIS; is that correct?

14 A. Correct.

15 Q. And you are not going to be opining on  
16 the strength of anyone else's defenses against Tractor  
17 Supply or the strength of the claims by Tractor Supply  
18 by other defendants; is that correct?

19 A. Correct.

20 Q. Okay. So everything -- all of your  
21 testimony is going to be exclusively limited to ESIS's  
22 role and what they did, right or wrong; is that right?

23 A. That's correct.

24 Q. And it is not going to be related to  
25 policy interpretation, unless supplemented?

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1 A. Correct.

2 Q. And it is not going to be related to  
3 ACE's claims handling?

4 A. Correct.

5 Q. And it is not going to be related to  
6 UniFirst's conduct?

7 A. Correct.

8 Q. Or anything related to UniFirst's  
9 Counterclaim?

10 A. Correct.

11 MR. BELL: All right. Then that is --  
12 Mr. Heinze, I appreciate the time, that is  
13 everything that I believe I have.

14 THE WITNESS: Pleasure being with you,  
15 Mark. Thank you for your courtesies.

16 MR. BELL: Thank you.

17 We will do the swearing off the record.

18 THE VIDEOGRAPHER: Any other questions?

19 MR. PULLIAM: Yeah, I have got some.

20

21 EXAMINATION

22 BY MR. PULLIAM:

23 Q. Mr. Heinze, this is Andy Pulliam. I  
24 represent UniFirst, and I have got some questions,  
25 hopefully it won't be that long but --

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1           A.       Hi, Andy.

2           Q.       Mr. Bell just asked you about you are not  
3 going to testify about policy interpretations but he  
4 asked you a lot of questions that involved policy  
5 interpretations, so I think that would negate a lot of  
6 those answers.

7                   Let me -- including the following: He  
8 asked you a lot of questions about settlement  
9 authority, and you testified, and correct me if I am  
10 wrong, that settlement authority would come from ACE  
11 whenever a reservation of rights letter -- after a  
12 tender but a reservation of rights letter was issued;  
13 is that correct what you said?

14          A.       That's my understanding, yes.

15          Q.       Wouldn't settlement authority only come  
16 from ACE after the duty to indemnify was found by ACE?

17          A.       Of course.

18          Q.       Okay. So if the duty to indemnify was  
19 never found by ACE regarding any of these 61 claims,  
20 ACE would never have had any duty to provide any  
21 settlement authority, correct?

22          A.       Correct.

23          Q.       Okay. So in this Downey case he was just  
24 asking you about, the Maynard case he asked you about,  
25 are you aware of whether or not a duty to indemnify was

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1       ever found -- a duty to indemnify Tractor Supply was  
2       ever found?

3               A.       I don't recall seeing that in the files.

4               Q.       Okay. If I represent to you that a duty  
5       to indemnify was not found in any of the 61 underlying  
6       claims, including the two that weren't in fact tendered  
7       so obviously there could be no indemnity, but if I  
8       represent to you in the 59 claims that Tractor Supply  
9       actually did tender that a duty to indemnify was never  
10      found by ACE -- take that assumption, that a duty to  
11      indemnify was never found by ACE regarding any of those  
12      59 claims that were tendered, would ACE have had any  
13      responsibility to pay any settlement funds, even if it  
14      was in the deductible?

15              A.       No.

16              Q.       All right. Let's see. I believe you  
17      said that in litigation matters -- you referenced  
18      eight, I'll say, are you aware that the eight  
19      involved -- included the Earlene Brown one that was  
20      never tendered?

21              A.       That is correct, yes.

22                      THE COURT REPORTER: I am sorry, what was  
23      the name of that?

24                      MR. PULLIAM: Earlene Brown.

25                      THE WITNESS: Earlene Brown,

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1 E A R L E N E, Brown.

2 THE COURT REPORTER: Thank you.

3 BY MR. PULLIAM:

4 Q. So the -- in the litigation matters where  
5 ACE provided a defense under a reservation of rights,  
6 the liability investigation by ESIS in all of those  
7 indicated that UniFirst was not liable; are you aware  
8 of that?

9 A. Yes, I believe Ms. Brown's claim was  
10 settled by Tractor Supply without a tender.

11 Q. Right, but I am talking about the ones --  
12 the other seven, and just FYI, Maynard, Padaway,  
13 Atkinson, Perryman, Bell, Downey, Holderness --

14 A. And what is your question with regard to  
15 them, Andy, again?

16 Q. I am about to get to it.

17 A. Okay.

18 Q. In those seven litigation matters where  
19 ACE provided defense under a reservation of rights, are  
20 you aware that ESIS found no liability on behalf of  
21 UniFirst?

22 A. I believe that is correct, yes.

23 Q. All right. I thought you testified that  
24 the reservation of rights was issued because the  
25 liability investigation by ESIS indicated that damages

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1 may have resulted from UniFirst mats?

2 A. No, if I -- if I testified to that,  
3 that's incorrect.

4 Q. Okay.

5 A. The reservation of rights, as I think I  
6 have testified, was based upon the allegations set  
7 forth within the claimant's complaint.

8 Q. Right. In fact, are you aware that none  
9 of ESIS's investigations of these underlying claims  
10 found any potential liability of UniFirst?

11 A. I believe that is also correct based upon  
12 my review of the claim files.

13 Q. Mr. Bell had asked you if -- who did the  
14 investigations of claims, and he asked you if the  
15 investigation of claims was done by ESIS and I believe  
16 you said yes, you said yes on behalf of UniFirst?

17 A. Correct.

18 Q. Wasn't there also another TPA, i.e.,  
19 Gallagher Bassett, who did investigations of Tractor  
20 Supply's claims?

21 A. Yes. As I have testified, there was a  
22 collection of information that ESIS would have  
23 collected both from Gallagher Bassett and its own  
24 investigations.

25 Q. And -- and Tractor Supply either directly

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1 or through Gallagher Bassett could have provided any  
2 facts it wanted to to ACE, correct?

3 A. Yes, but I don't remember seeing, as I  
4 have testified, any objection or any declaratory  
5 judgement action or anything else filed by Tractor  
6 Supply with regard to any of those matters.

7 Q. Well, do -- do you recall seeing any  
8 response by Gallagher -- do you recall the tender --  
9 tender letters -- or I am sorry, the tender response  
10 letters from ACE going to Gallagher Bassett; do you  
11 recall those?

12 A. I do.

13 Q. Do you recall those, all of them, in  
14 fact, saying we are aware of no negligence or defect  
15 which caused or contributed to the incident?

16 A. That's correct.

17 Q. Are you aware of any Gallagher Bassett or  
18 Tractor Supply claim to ACE after any of those tender  
19 response letters saying here is additional facts which  
20 we think shows the negligence or defect of the mat?

21 A. I have not seen any of those  
22 communications in the claims files that I have  
23 reviewed.

24 Q. But Tractor Supply through Gallagher  
25 Bassett was invited to provide such facts, was it not?

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1           A.           It was, yes.

2           Q.           All right, last topic I am going to ask  
3 about is -- Mr. Bell asked you about "resulted from"  
4 means -- and if I am not mistaken, you originally said  
5 that it means that it caused the incident or accident;  
6 do you recall that?

7           A.           I do.

8           Q.           Then he and you talked about the  
9 difference between a mat precipitating an incident or a  
10 mat being involved in an incident; do you recall that  
11 discussion?

12          A.           I do.

13          Q.           Now I want to ask you to be clear because  
14 I am confused by your prior testimony. If a mat  
15 precipitated an incident, would that be "resulting  
16 from"?

17          A.           No.

18          Q.           Well, if a mat was involved in an  
19 incident --

20          A.           It potentially could be. But, again,  
21 that would require me to render a legal opinion which I  
22 have not been asked to do.

23          Q.           Okay. Okay. So all of those questions  
24 about what "resulting from" means, that is actually --  
25 you would consider that to be a legal opinion?

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1           A.           I would, yes.

2                       MR. PULLIAM:   Okay.   That's all I have.

3                       THE WITNESS:   Thanks, Andy; good to see  
4           you.

5                       MR. BELL:   Quick follow-up if I can,  
6           Andy.

7

8                                       REEXAMINATION

9       BY MR. BELL:

10           Q.           I just -- just want to make sure I -- I  
11   am clear.   I thought you had testified earlier that  
12   "resulting from" means involved in precipitating the  
13   result?

14                       MR. PULLIAM:   Object to the form, that is  
15   the confusion that I was testifying -- I was  
16   asking about.

17                       THE WITNESS:   And if I was confusing, I  
18   apologize, counsel.   It is not my intent to render  
19   legal opinion here.   I want to stay away from the  
20   legal opinions and leave that discussion to you  
21   all to undertake with the Court.

22       BY MR. BELL:

23           Q.           All right.   I am with you -- I am just  
24   trying -- I guess -- I guess -- I guess we have got the  
25   record but I guess maybe I am equally confused then,

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1       but that's all I have got.

2                   MR. PULLIAM:  Nothing further from me.

3                   MS. CHRISTOPHER:  Nothing from me.

4                   MR. WARRINGTON:  Mr. Heinze, I have  
5       nothing either, thank you very much.

6                   THE WITNESS:  Thank you, Al; good to see  
7       you.

8                   MR. BELL:  Thanks, guys.

9                   THE WITNESS:  Kelly, David, thank you  
10      very much for your help today.

11                  THE VIDEOGRAPHER:  That concludes today's  
12      testimony.  We are off the record at 12:14 p.m.

13  
14                   (Off the Record at 12:14 p.m.)

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C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Kelly Forfar, LCR #833, Licensed Court Reporter in and for the State of Tennessee, do hereby certify that the above deposition was reported by me and that the foregoing 134 pages of the transcript are a true and accurate record to the best of my knowledge, skills, and ability.

I further certify that I am not related to nor an employee of counsel or any of the parties to the action, nor am I in any way financially interested in the outcome of this case.

I further certify that I am duly licensed by the Tennessee Board of Court Reporting as a Licensed Court Reporter as evidenced by the LCR number and expiration date following my name below.

Kelly Forfar

Kelly Forfar, LCR# 833

Expiration Date: 6/30/24

1 1 Alissa K. Christopher

2 2 akchristopher@cozen.com

3 3 February 13, 2023

4 4 RE: Tractor Supply Company v. Ace American Insurance Company  
Et Al

5 5 2/8/2023, Bernd G. Heinze (#5672897)

6 6 The above-referenced transcript is available for  
7 7 review.

8 8 Within the applicable timeframe, the witness should  
9 9 read the testimony to verify its accuracy. If there are  
10 10 any changes, the witness should note those with the  
11 11 reason, on the attached Errata Sheet.

12 12 The witness should sign the Acknowledgment of  
13 13 Deponent and Errata and return to the deposing attorney.  
14 14 Copies should be sent to all counsel, and to Veritext at  
15 15 errata-tx@veritext.com.

16 16  
17 17 Return completed errata within 30 days from  
18 18 receipt of testimony.

19 19 If the witness fails to do so within the time  
20 20 allotted, the transcript may be used as if signed.

21 21

22 22 Yours,

23 23 Veritext Legal Solutions

24 24

25 25

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1 Tractor Supply Company v. Ace American Insurance Company Et Al  
2 Bernd G. Heinze (#5672897)

3 E R R A T A S H E E T

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6 REASON\_\_\_\_\_

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9 REASON\_\_\_\_\_

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21 REASON\_\_\_\_\_

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24 Bernd G. Heinze Date

25

1 Tractor Supply Company v. Ace American Insurance Company Et Al  
2 Bernd G. Heinze (#5672897)

3 ACKNOWLEDGEMENT OF DEPONENT

4 I, Bernd G. Heinze, do hereby declare that I  
5 have read the foregoing transcript, I have made any  
6 corrections, additions, or changes I deemed necessary as  
7 noted above to be appended hereto, and that the same is  
8 a true, correct and complete transcript of the testimony  
9 given by me.

10

11

12

\_\_\_\_\_  
Bernd G. Heinze

\_\_\_\_\_  
Date

13

\*If notary is required

14

SUBSCRIBED AND SWORN TO BEFORE ME THIS

15

\_\_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_\_\_.

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[making - message]

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[mgas - obligations]

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[obligations - outsourced]

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[outsourcing - plaintiff's]

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Tennessee Rules of Civil Procedure  
Depositions Upon Oral Examination  
Rule 30

Rule 30.05: Submission to Witness; Changes;  
Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition

may then be used as fully as though signed unless on a motion to suppress under Rule 32.04(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

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